Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Burns, Sarah
burns@mercury.law.nyu.edu
212-998-6464

Deger-Sen, Samir
Samir.deger-sen@lw.com
212-906-4619

Brown, Rebecca
rbrown@law.usc.edu
213-740-1892

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Please consider my application for a clerkship in your chambers for the 2025-2026 term or any subsequent term. I graduated from the New York University School of Law in May 2022. I have lived in New York City with my fiancé for several years and would be honored to serve the city as a judicial clerk.

I currently work as an Associate at Latham & Watkins LLP and previously served as a Managing Editor of the *N.Y.U. Review of Law & Social Change* during the 2021-2022 academic year. I feel these experiences have prepared me to be a diligent and resourceful clerk.

Enclosed please find my resume, law school transcripts, and writing sample. My writing sample is a memorandum I wrote as part of my fieldwork for the NYU School of Law Reproductive Justice Clinic. It addresses the legal standards South Dakota state courts use to assess equal protection challenges. My recommendation letters are from Rebecca Brown, Sarah E. Burns, and Samir Deger-Sen. Rebecca Brown is a professor at USC Gould School of Law; she was my professor for my first-year constitutional law course, and I was also her research assistant for the summer of 2020. Sarah E. Burns is a clinical professor at NYU School of Law who taught and supervised me in the Reproductive Justice Clinic at NYU. Samir Deger-Sen is a partner at Latham & Watkins LLP who has overseen my work on multiple litigation matters.

I would welcome the opportunity to discuss my qualifications and am available for an interview at your convenience. Thank you for your time.

Respectfully,
/s/
Emily True

EMILY ROSE TRUE

emily.true@nyu.edu • 925-819-0132

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Juris Doctor, May 2022
Unofficial GPA: 3.63
Honors: *Review of Law and Social Change*, Managing Editor
Review of Law and Social Change Stewardship Award
Activities: Transfer Student Committee (President); American Constitution Society (Board Member)

UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SCHOOL OF LAW, Los Angeles, CA
Matriculated August 2019 – May 2020
Honors: *Southern California Law Review*, Invitation Extended
USC Gould Merit Scholarship Recipient
High Honors Grade in Legal Research, Writing and Advocacy
Honors Grades in Civil Procedure and Contracts
Activities: American Constitution Society; Public Interest Law Foundation; Gould Philosophy Society

UNIVERSITY OF PENNSYLVANIA, Philadelphia, PA
Bachelor of Arts, *magna cum laude*, Political Science with Middle Eastern Studies Minor, December 2016
Honors: Pi Sigma Alpha Political Science Honors Society
Friars Senior Society, recognizing on-campus leadership
Activities: Performing Arts Council Executive Board; Counterparts A Cappella; Political Science Research Assistant

EXPERIENCE

LATHAM & WATKINS LLP, New York, NY
Associate, October 2022 – present, ***Legal Intern***, July 2021 – April 2022, and ***Summer Associate***, May 2021 – July 2021
Research and draft memoranda on English common law and Founding Era law for Supreme Court briefing and oral argument. Prepare witness interview outlines for antitrust investigation. Interview potential plaintiffs and draft plaintiff declarations for First Amendment academic freedom litigation.

NYU REPRODUCTIVE JUSTICE CLINIC, New York, NY
Clinic Student, August 2021 – May 2022
Produced memorandum on how state courts assess expert testimony for organizational client litigating in state court. Drafted section of a response motion in opposition to defendants' motion to exclude expert testimony and cite checked full motion. Researched and drafted memorandum on how state courts assess facial challenges and possible procedural and constitutional challenges to currently enforced statutes.

BRENNAN CENTER FOR JUSTICE, New York, NY
Legal Intern, Democracy Program, January 2021 – April 2021
Reviewed draft voting rights legislation to assess amendments and changes to legislative language. Compiled case law on board of elections lawsuits. Wrote memorandum assessing constitutionality of state tax on digital advertising. Cite-checked congressional testimony. Assisted with Center events on judicial diversity and inclusion.

THE HON. SIDNEY H. STEIN, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, New York, NY
Judicial Intern, June 2020 – August 2020
Conducted legal research on civil and criminal issues and drafted memoranda and opinions for chambers. Cite-checked judicial opinions before filing. Attended remote and in-person court proceedings and hearings.

PROFESSOR REBECCA BROWN, USC GOULD SCHOOL OF LAW, Los Angeles, CA
Research Assistant, June 2020 – August 2020
Compiled relevant data and scholarship and drafted outline for Professor Brown's article on the lack of meaningful constitutional constraints on the presidency. Reviewed executive orders and presidential actions taken using statutory powers delegated by Congress.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, New York, NY
Litigation Paralegal, August 2017 – June 2019
Supervised paralegal teams and managed projects for partners and associates. Served as senior paralegal on Voting Rights Act case and oversaw three-week preliminary injunction hearing, depositions, and discovery. Created organizational infrastructure for class action immigration lawsuit. Performed fact research and compiled data for FCPA practice group publications.

ADDITIONAL INFORMATION

Volunteer as a clinic escort for an NYC abortion clinic. Interests include reading, singing, and baking.

Name:	**Emily R True**
Print Date:	**05/08/2023**
Student ID:	**N19314177**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/18/2022
School of Law
Major: Law

Transfer Credits

Transfer Credit from Univ Southern California
Applied to Fall 2020

Course	Description	Units
LAW 502	Contracts	4.0
LAW 503	Procedure	4.0
LAW 504	Criminal Law	3.0
LAW 507	Property	4.0
LAW 508	Constitutional Law	3.0
LAW 509	Torts	4.0
LAW 531	Ethical Issues for Public Inte	3.0
	Transfer Totals:	25.0

Transfer Credit from Univ of Southern Calif/Law
Applied to Fall 2020

Course	Description	Units
LAW 515	Legal Research	3.0
LAW 516	Legal Research	2.0
	Transfer Totals:	5.0

Fall 2020

School of Law
Juris Doctor
Major: Law

The Law of Democracy	LAW-LW 10170	4.0	B+
Instructor: Richard H Pildes			
Legislation and the Regulatory State	LAW-LW 11633	4.0	B+
Instructor: Roderick M Hills			
Trademark and False Advertising Law	LAW-LW 11923	4.0	B
Instructor: Barton C Beebe			
Domestic Violence Law Seminar	LAW-LW 12718	2.0	A
Instructor: Emily Joan Sack			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	14.0	44.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	4.0	A-
Instructor: Ryan J Bubb			
Federal Health Reform: Law, Policy and Politics Seminar	LAW-LW 11371	2.0	A
Instructor: Mary Ann Chirba			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
Supreme Court Seminar	LAW-LW 12064	2.0	A
Instructor: Troy A McKenzie Yaira Dubin Sina Kian			
Lawyering for Transfers	LAW-LW 12627	3.0	CR
Instructor: Gary Michael Parsons			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	29.0	59.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Family Law	LAW-LW 10729	4.0	A
Instructor: Melissa E Murray			
Reproductive Justice Clinic	LAW-LW 12261	3.0	A
Instructor: Sarah E Samuels Sarah E Burns			
Reproductive Justice Clinic Seminar	LAW-LW 12262	3.0	A-
Instructor: Sarah E Samuels Sarah E Burns			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	43.0	73.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Federal Courts and the Federal System	LAW-LW 11722	4.0	B+
Instructor: David M Golove			
Review of Law & Social Change	LAW-LW 11928	2.0	CR
Advanced Reproductive Justice Clinic	LAW-LW 12333	3.0	A
Instructor: Sarah E Samuels Sarah E Burns			
Advanced Reproductive Justice Clinic Seminar	LAW-LW 12334	2.0	A
Instructor: Sarah E Samuels Sarah E Burns			

	AHRS	EHRS
Current	11.0	11.0
Cumulative	54.0	84.0

Staff Editor - Review of Law & Social Change 2020-2021
Managing Editor - Review of Law & Social Change 2021-2022

End of School of Law Record

On-line Academic Student Information System

OASIS Unofficial Transcript

ID#: 8899404276

askUSC Knowledge Base Start Here

Last Name	First Name
True	Emily

Unofficial Transcript

Current Degree Objective

	Degree Name	Degree Title
MAJOR	Unknown	

Cumulative GPA through 20202

	Uatt	Uern	Uavl	Gpts	GPAU	GPA
UGrad	0.0	0.0	0.0	0.00	0.0	0.00
Grad	0.0	0.0	0.0	0.00	0.0	0.00
Law	36.0	36.0	36.0	57.80	16.0	3.61
Other	0.0	0.0	0.0	0.00	0.0	0.00

Fall Term 2019

Course	Units Earned	Grade	Course Description
LAW-530	1.0	CR	Fundamental Business Principles
LAW-515	3.0	4.1	Legal Research, Writing, and Advocacy I
LAW-509	4.0	3.1	Torts I
LAW-503	4.0	3.5	Contracts
LAW-502	4.0	3.8	Procedure I

Spring Term 2020

Course	Units Earned	Grade	Course Description
LAW-531	3.0	CR	Ethical Issues for Public Interest, Government and Criminal Lawyers
LAW-516	2.0	CR	Legal Research, Writing, and Advocacy II
LAW-508	3.0	CR	Constitutional Law: Structure
LAW-507	4.0	CR	Property
LAW-504	3.0	CR	Criminal Law

Summer Term 2020

Course	Units Earned	Grade	Course Description
LAW-790	1.0	3.9	Legal Externship
LAW-781	4.0	CR	Externship I

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

The following guidelines represent NYU School of Law's guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	**A** = 7-13%	**A-** = 16-24%
B+ = 22-30%	**B** = Remainder	**B-** = 0-8% (First-Year JD); 4-11% (All other JD and LLM)
C/D/F = 0-5%	**CR** = Credit	**IP** = In Progress
EXC = Excused	**FAB** = Fail/Absence	**FX** = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 9/14/2020

NYU | LAW

SARAH E. BURNS
Reproductive Justice Clinic
Professor of Clinical Law

NYU School of Law
245 Sullivan Street, 507
New York, NY 10012
P: 212 998 6464
F: 212 995 4031
burns@mercury.law.nyu.edu

June 12, 2023

RE: Emily True

Dear Judge:

It is my privilege to recommend Emily True for a clerkship with your chambers. I supervised Ms. True during the Fall 2021 and Spring 2022 Academic Semesters in my role teaching and supervising the Reproductive Justice Clinic at New York University School of Law (the "Clinic"). We met several times each week in a seminar and in meetings about her legal fieldwork. A committed professional, Ms. True is a pleasure to work with and to know.

Ms. True gave consistently strong performances in the Fall 2021 and Spring 2022 seminars. She was always prepared for class and brought insights to discussion. The Fall 2021 seminar involves substantial case law reading, and Ms. True analyzed the cases thoughtfully and well. During the Spring 2022 seminar, Ms. True gave a well-researched and visually very informative presentation on the history, purpose and strategies of non-medical organizations defined as Crisis Pregnancy Centers, including the success of such centers in garnering public funding that might otherwise go to support needed and wanted reproductive health care.

Ms. True was equally strong in the fieldwork component of the Clinic. During the Fall 2021 semester, Ms. True worked with a team researching Minnesota's Rules of Evidence on admissibility of expert testimony. The research anticipated motions to exclude several of our client's experts, so the team had to read case law in view of its relevance to various types and sources of expertise. Ms. True's first research task was parsing the Minnesota Frye-Mack test, which is the standard Minnesota applies in determining whether to admit expert testimony involving a novel scientific theory. When and how that test is used is nuanced and Ms. True did an excellent job mining the caselaw to identify the conditions under which the standard is and is not to be used. At the end of the semester, the team worked on an expedited schedule to contribute to a successful memorandum of law opposing motions to exclude a number of our client's expert witnesses. On fast turnaround and at the eve of Fall finals, Ms. True drafted a powerful response arguing specifically the relevance and importance of a historian's expert testimony, successfully countering the argument against admission of expert testimony which the opposition dismissively characterized as a roving "history of patriarchy in the laws of the nation." Ms. True cogently demonstrated the unique and case-pertinent insights offered by the expert and drew forward landmark U.S. Supreme Court cases specifically discussing the importance of historical information in

understanding a case in context, which was the ultimate point of the historian's proffered testimony.

Ms. True's Spring 2022 fieldwork was complicated, and her work was outstanding. Her team advised a client on the requirements for bringing a facial challenge in South Dakota courts. Ms. True surveyed the South Dakota state courts' concept of facial challenge to arguments about constitutionality on equal protection and procedural due process grounds. Reviewing numerous case decisions under each doctrine, she gave careful attention to the subtleties in application of each doctrine to the particular facts in each case. Ms. True read and re-read the cases to truly understand the differing facts, and not just recite the doctrine's tests. She provided a thorough memorandum that apprised our client of what is required by each test, including commentary about variations in each doctrine's application that might be important to note depending on the context. This was impressive work and showed an ability to steer a complex project from start to finish.

Ms. True is also a natural leader, who shows impressive willingness and ability to humbly assume leadership and inspire collegial work.

If you have any questions regarding Ms. True or her work, I would be pleased to speak with you. I can be reached by email, at sarah.burns@nyu.edu or by cell phone, (845) 820-1671. Thank you.

Sincerely,

Sarah E. Burns

Sarah E. Burns

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I'm writing to strongly recommend Emily True for a position as law clerk in your Chambers. Emily is currently a first-year associate at the New York office of Latham & Watkins, where I am a partner in the Supreme Court and Appellate practice group. Emily has done a substantial amount of work for me across a number of different cases, including (1) helping me prepare for an argument at the U.S. Supreme Court; (2) drafting substantive research memos on challenging issues in several of our cases; and (3) leading the charge in a significant affirmative litigation involving a First Amendment challenge to a law limiting academic speech. In each of these tasks, Emily's work has been consistently outstanding. And, equally important, Emily is a truly delightful colleague. I'm absolutely convinced that she would make a wonderful addition to the life of Chambers, and quickly become a trusted and invaluable resource.

In my practice, I work with junior associates on writing tasks very similar to the work they will conduct as a law clerk. A junior associate will typically research the law, prepare memorandums addressing the key issues in a case, help draft sections of a brief, and then help prepare me for oral argument. In assisting with these tasks, I can attest that Emily is one of the strongest first-year associates I have ever worked with. Her legal writing is sharp and incisive, she is a natural and clear communicator, and her research is always diligent and thorough. For example, in preparing me for my Supreme Court argument addressing the appropriate remedy for a violation of the constitutional venue right, Emily prepared an outstanding, sophisticated and comprehensive memo on the history of the use of special verdicts at common law, during the founding, and today. Several questions were asked on the subject at argument, and Emily's careful research proved invaluable. Similarly, for our First Amendment litigation, Emily has devoted countless hours to (1) researching and synthesizing difficult areas of law; (2) interviewing and evaluating potential plaintiffs; and (3) working up detailed fact declarations to support our litigation. In all of these diverse tasks, I know I can rely on Emily to produce timely and comprehensive work—and at a quality far beyond what I would expect from a first-year associate.

In short, I think Emily would be a terrific fit for a clerkship in your Chambers. Her friendly and engaging personality will be a wonderful addition to a close-knit chambers community, and her diligence and sharp thinking are ideal for work as a law clerk. While her academic record is, of course, strong, I think it considerably understates Emily's talents. In my practice, I routinely work with the best young lawyers in the country—including numerous Supreme Court clerks and those who have graduated at the top of their classes. Emily's legal aptitude stands up to the very best. I recommend her without reservation.

Samir Deger-Sen

Partner, Latham & Watkins

Samir Deger-Sen - Samir.deger-sen@lw.com - 212-906-4619

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing at the request of Emily True, a remarkable student who is seeking a clerkship in your chambers. I offer to you my highest recommendation of Emily as a student and potential clerk.

Emily was my student in Constitutional Law her first year of law school, when the semester was interrupted by a shut-down after spring break due to COVID. Fortunately, I had already gotten to know Emily quite well as an absolute standout in the class, and had come to admire her deeply before our physical contact was eliminated. Online, those positive impressions only grew stronger.

Emily's love for politics and law came out clearly in my class, as we discussed many issues of the day in connection with our study of structural constitutional law. Emily was knowledgeable, engaged, distinctively bright and thoughtful, hard-working, and enthusiastic. I was so impressed with her performance in class, in fact, that I asked her to be my research assistant for the summer, without ever opening it up to general applications.

That summer, she was the best research assistant I have ever had. The first set of materials that she produced for me showed that she understood in depth the project that I was undertaking, her mastery of legal research and analysis, and most of all an impressive, pro-active work ethic. She did a great deal for me in addition to her full-time judicial internship with a judge on the Southern District of New York.

I was particularly impressed with her desire and ability to think independently about my project and offer her own ideas and solutions to challenges that we faced in structuring the paper. She contributed substantively in ways that I would not have expected a 1L student to be able to do.

In addition to her impressive work in class, Emily was active in important student organizations while at USC and showed leadership among her peers both in and out of class. Needless to say, I was devastated when she told me of her decision to transfer to NYU. They were very lucky to get her, as I believe your chambers would be as well. I had the privilege of being a law clerk to two federal judges long ago, one on the D.C. Circuit and the other Justice Thurgood Marshall. Those life-altering experiences taught me a great deal about what makes a good judicial clerk, and I believe Emily possesses those qualities, which essentially boil down to intellectual talent and the personal qualities to make the most of it. I whole-heartedly recommend her.

Sincerely,

Rebecca L. Brown
The Rader Family Trustee Chair in Law

Rebecca Brown - rbrown@law.usc.edu - 213-740-1892

EMILY ROSE TRUE

emily.true@nyu.edu • 925-819-0132

Writing Sample

My writing sample is an excerpted portion of a longer memorandum I helped to prepare as part of my fieldwork for the New York University School of Law Reproductive Justice Clinic. It addresses the legal standards South Dakota state courts use to assess equal protection claims. The full memorandum also addressed the legal standards for facial challenges on overbreadth, vagueness, and procedural due process grounds. Some parts of the full memorandum were written by a classmate, and we received minor structural feedback from our clinical professor on the memorandum. The portions excerpted for my sample are my own writing.

The memorandum was produced for an organizational client; the client has given permission for me to share this excerpted portion. To preserve client confidentality, the name of the client, the client's facts, and the specific state statutes the client sought to challenge have been removed.

To: New York University School of Law Reproductive Justice Clinic Client
From: Emily True
Re: Standards for Equal Protection Challenges in South Dakota State Court

Question Presented

How will state courts in South Dakota assess an equal protection challenge to a currently enforced South Dakota state law?

Short Answer

This memo describes the substantive and legal standards for equal protection claims in South Dakota state courts. Any challenge to a South Dakota state law must overcome a strong presumption of constitutionality for legislative enactments. The plaintiff bears the burden of proving beyond a reasonable doubt that the statute violates a constitutional provision.

Equal Protection. Almost all South Dakota court decisions treat federal and state equal protection claims in the same manner. Most equal protection challenges brought in state courts are assessed under rational basis review. The South Dakota rational basis test examines whether: 1) the statute sets up arbitrary classifications between citizens, and 2) there is a rational relationship between the classification and a legitimate legislative purpose. *In re Davis*, 2004 SD 70, ¶ 5, 681 N.W.2d 452, 454. South Dakota courts have struck down legislative enactments on rational basis grounds, indicating that the state court rational basis test has more teeth than its federal counterparts. *See generally, e.g.*, *Aberdeen v. Meidinger*, 233 N.W.2d 331 (S.D. 1975).

South Dakota also recognizes varying levels of scrutiny for certain classes: strict scrutiny for fundamental rights or suspect classes, intermediate or substantial relation test for legitimacy and gender, and rational basis test for all other classes. *Lyons v. Lederle Lab., Div. of Am. Cyanamid, Co.*, 440 N.W.2d 769, 771 (S.D. 1989). South Dakota courts seem to generally

default to a rational basis test; very few equal protection challenges have been analyzed under heightened scrutiny.

Discussion

Below, I review how South Dakota state courts assess constitutional challenges on equal protection grounds. The first section addresses South Dakota's strong presumption of constitutionality for statutes and legislative enactments. I then examine how South Dakota courts treat equal protection causes of action.

I. The Strong Presumption of Constitutionality for Legislative Enactments.

In cases involving challenges to South Dakota statutes, South Dakota courts give significant deference to statutes and other legislative enactments. Constitutional challenges to statutes meet "formidable restrictions." *State v. Hauge*, 1996 SD 48, ¶ 4, 547 N.W.2d 173, 175.[1] Laws enacted by the legislature are presumed reasonable, valid, and constitutional. *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728 ("This Court recognizes a strong presumption that a statute is constitutional); *Steinkruger v. Miller*, 2000 SD 83, ¶ 8, 612 N.W.2d 591, 595 (same); *Oien v. Sioux Falls*, 393 NW.2d 286, 289 (S.D. 1986) (noting a "strong presumption that the laws enacted by the legislature are constitutional"). This presumption is applied to claims made both under the state and federal constitutions. *See State v. Krahwinkel*, 2002 SD 160, ¶ 43, 656 N.W.2d 451, 465–66 (addressing state and federal constitutional challenges); *Sedlacek v. South Dakota Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D. 1989) (same).

[1] South Dakota state courts typically require case citations to include both the official reporter (N.W.2d) and the South Dakota Supreme Court regional reporter (SD). The SD volumes are reported South Dakota Supreme Court decisions numbered according to the year of the decision's issuance, and corresponding pincites follow a paragraph format. So, for example, if I cite: *State v. Hauge*, 1996 SD 48, ¶ 4, 547 N.W.2d 173, 175, this means that *Hauge* was decided in 1996, ¶ 4 is the pincite, and then the corresponding parallel citation to the official reporter follows. Additionally, only cases published in 1996 and after have both the official and regional reporter, so only those cases will have parallel citations. *See* S.D. R. Civ. Proc. § 15-26A-69.1 (2010).

"When the constitutionality of a statute is challenged, this court will uphold the statute unless its unconstitutionality is shown beyond a reasonable doubt." *State v. Heinrich*, 449 N.W.2d 25, 27 (S.D. 1989). The challenger of the statute bears this burden of proof. *Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595. This presumption is overcome when the challenger of the statute can prove that "the unconstitutionality of the act is, 'clearly and unmistakenly [sic] shown and there is no reasonable doubt that it violates constitutional principles.'" *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728 (quoting *South Dakota Educ. Association/NEA By and Through Roberts v. Barnett*, 1998 SD 82, ¶ 22, 582 N.W.2d 386, 392).

The South Dakota Supreme Court rarely goes into depth analyzing the presumption as it applies in a case, and in every surveyed case does not appear to decide the constitutionality of statutes solely based on the presumption. Instead, the Court will often briefly acknowledge the presumption of constitutionality and then move to analysis of the constitutional challenge.[2] One rare example of the Court analyzing the presumption of constitutionality in greater depth occurs in *Sedlacek*. A plaintiff filed a complaint with the South Dakota Human Rights Commission after she was not allowed to participate in a state baseball tournament because the tournament banned girls from participating. 437 N.W.2d at 867. Her complaint was dismissed by the Commission on the grounds that SDCL 20-13-22.1(2), a statutory exception allowing for sex-segregated

[2] The South Dakota Supreme Court tends to address the presumption of constitutionality first in its analysis. *See Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595; *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728. Rarely, however, does the Court go into more detail regarding analysis of the presumption. *See Stark*, 2011 SD at ¶ 10, 802 N.W.2d at 169 (reviewing the presumption of constitutionality before proceeding into overbreadth and vagueness analysis of the statute at issue); *Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595 (reviewing constitutional interpretation and presumption of constitutionality rules before assessing claims against the constitutionality of forced medication statutes); *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728 (initially discussing that statutes are presumed constitutional and the challenger must refute the presumption beyond a reasonable doubt as part of the initial standard of review).

In at least one case, the Court analyzed the merits of the claim and noted that the presumption applies at the end of its analysis. *See Behrns*, 229 N.W.2d at 89–90 (Concluding that "[i]n applying these tests to the . . . statute [at issue,] we must remember that 'Statutes should not be declared unconstitutional unless their infringement on constitutional rights leaves no reasonable doubt.'" (quoting *Berens v. Chicago*, 120 N.W.2d 565, 570 (S.D. 1963)).

activities (such as scouting programs and fraternities), exempted the baseball program from the provisions of the South Dakota Human Rights Act. *Id.* The plaintiff appealed the dismissal of her complaint to a trial court, and the court held that the statutory exception was an unconstitutional deprivation of equal protection under both the South Dakota and United States Constitutions. *Id.* The South Dakota Supreme Court subsequently reversed the trial court's decision that the statutory exception was facially unconstitutional. *Id.* at 869. The Supreme Court noted that the trial court made two critical analytical errors: 1) the trial court "gave no heed" to the presumption of constitutionality for legislative enactments, and 2) it did not determine whether plaintiff met the burden of proving beyond a reasonable doubt the statute was unconstitutional. *Id.* at 868–69. The Court then proceeded through analysis of the specific claims after acknowledging the trial court erred with regards to the presumption of constitutionality. *Id.* at 860.[3]

The South Dakota Supreme Court has explained that "[o]rdinarily, we review the constitutionality of a statute only when it is necessary to resolve the specific matter before us, and then only to first decide if the statute can be reasonably construed to avoid an unconstitutional interpretation." *Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595 (citing *City of Chamberlin v. R.E. Lien*, 521 N.W.2d 130, 131 (S.D. 1994)). Courts "must adopt any reasonable and legitimate construction" of the statute at issue that will allow the statute to be constitutionally upheld. *Oien*, 393 N.W.2d at 289.

South Dakota Supreme Court decisions generally demonstrate the Court's strong resistance to finding state statutes unconstitutional. *See, e.g.*, *Heinrich*, 449 N.W.2d at 27

[3] The lower court in *Sedlacek* found that the statute at issue was unconstitutional under the equal protection clauses of both the South Dakota and United States Constitutions. There was no distinction made between the federal equal protection clause and the South Dakota equivalent; the court conducted one analysis of the equal protection issue using the two-part test outlined in *Aberdeen v. Meidinger*, 233 N.W.2d 331 (S.D. 1975). *See* Section II for full review of equal protection challenges in South Dakota courts.

(finding constitutional a statute revoking the right of an individual to refuse to submit to a blood alcohol test on suspicion of driving while intoxicated if the individual has twice previously been convicted of driving under the influence); *Steinkruger*, 2000 SD at ¶¶ 18–21, 612 N.W.2d at 599–600 (holding that a South Dakota forced medication statutory scheme comported with due process requirements by incorporating a "least restrictive alternative" requirement for forced medication orders and therefore was constitutional both facially and as applied to the patient suing); *Asmussen*, 2003 SD at ¶¶ 2, 9, 18, 668 N.W.2d at 728, 731, 734 (reversing a trial court decision finding that a South Dakota statute criminalizing stalking was overbroad on its face and unconstitutionally vague); *Stark*, 2011 SD at ¶¶ 9–16, 802 N.W.2d at 168–71 (upholding the constitutionality of South Dakota statutes that prohibit sex offenders from loitering in community safety zones). Notably, in *Oien*, the Court did find that statutes granting municipal parks immunity, which prevented a mother from suing the city for negligence, were unconstitutional under South Dakota Constitution Article VI, § 20, known as the "open courts provision." 393 N.W.2d at 288, 291. The dissent in *Oien*, however, argued that the plaintiff did not meet the "beyond a reasonable doubt" standard of proof needed to rebut the presumption that the park immunity states were constitutional. *Id.* at 291–92.

II. South Dakota Has Found Some Statutes Unconstitutional Solely on a Rational Basis Analysis of the Legislative Classifications and Also Recognizes a Higher Level of Scrutiny is Due in Some Circumstances.

Equal protection challenges are typically brought both under the Equal Protection Clause of the Fourteenth Amendment and its corresponding state counterpart, Article VI, § 18 of the South Dakota Constitution. *See, e.g.*, *Heinrich*, 449 N.W.2d at 27. Article VI, § 18, also referred to as the Privileges and Immunities Clause, provides: "no law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. CONST. art. VI, § 18. However, at

least one decision has noted there is a difference between the state and federal clauses: "the term 'equal protection' does not appear in Art. VI, § 18, and research leads us to believe that the tests used in applying the federal and state guarantees are not identical. Article VI, § 18, is, if anything a more stringent constitutional standard than the Fourteenth Amendment." *Behrns*, 229 N.W.2d at 88. Other decisions seem largely not to make this distinction. *See, e.g.*, *Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460.

In assessing an equal protection challenge, the South Dakota Supreme Court will generally start with the presumption of constitutionality for legislative enactments. *See supra* I. The Court will often note that the task of classification is "primarily for the Legislature" and the Court "will not interfere 'unless the classification is clearly arbitrary and unreasonable'" in the context of an equal protection challenge. *See Krahwinkel*, 2002 SD at ¶ 18, 656 N.W.2d at 460 (quoting *Berens v. Chi, Milwaukee, St. Paul & Pac. R.R. Co.*, 120 N.W.2d 565, 570 (S.D. 1963)). As an example, in *Behrns*, the South Dakota Supreme Court upheld a statute whose underlying rationale had been both criticized and found unconstitutional by courts in other states. 229 N.W.2d at 90. The Court noted that while they agree with other courts that the statute is "unreasonable social policy," this Court's inquiry must examine "the rational connection between the legislative means and the legislative ends, not the wisdom of any social policy embodied in those ends." *Id.* at 92.

This memo will first discuss the South Dakota rational basis analysis, which state courts appeared to apply with more bite than federal courts do for the federal standard. A section on heightened scrutiny follows.

A. Courts have struck down some statutes under the South Dakota rational basis test.

"'When a statute has been called into question because of an alleged denial of equal protection of the laws,' [South Dakota courts] employ [a] traditional two-part test.'" *In re Davis*,

2004 SD 70, ¶ 5, 681 N.W.2d 452, 454 (quoting *Acct. Mgmt. v. Williams*, 484 N.W.2d 297, 299–300 (S.D. 1992)). This test examines: 1) whether the statute sets up arbitrary classifications between citizens, and 2) provided the classification does not involve a fundamental right or suspect class, whether there is a rational relationship between the classification and some legitimate legislative purpose. *Id.* at ¶ 5, 681 N.W.2d at 454; *Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460; *Aberdeen*, 233 N.W.2d at 333. For a classification to be upheld, it "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." *Behrns*, 229 N.W.2d at 88 (quoting *Reed v. Reed*, 404 U.S. 71, 92 (1971)). Classifications are arbitrary "only if they were made 'without adequate determining principle.'" *Davis*, 2004 SD at ¶ 7, 681 N.W.2d at 455 (quoting *Acct. Mgmt.*, 484 N.W.2d at 300).[4]

Examples of this analysis follow. In *Aberdeen*, a defendant brought a successful equal protection challenge against SDCL 9-19-4, a statute which delineated sentencing maximums for cities that had municipal courts while cities without municipal courts had a different, lesser maximum sentencing scheme. 233 N.W.2d at 332–33. The defendant was convicted for illegally

[4] An early case, *Behrns*, delineated two separate tests for enforcing Article VI, § 18 of the South Dakota Constitution. In the first test, the Court will invalidate statutes when it disagrees "with the class lines drawn by the legislature." 229 N.W.2d at 89. Class distinctions must be "clearly and wisely drawn," not cause arbitrary distinctions between people in "substantially the same situation," and any discrimination between people "must rest upon some reasonable ground of difference." *Id.* This test

> [i]s not a substitution of the court's judgment for that of the legislature regarding the wisdom of the statutory purpose – it is an examination by this court to ensure that the persons affected by a statute are those that should be reached to achieve the desired legislative ends. Where, however, the line between those touching the problem to be remedied and those having no relation to the problem is not easily discernible, we have indicated we will not disturb the legislature's classification.

Id. The Court will also enforce Art. VI § 18 by requiring that the challenged act "accomplish[es] what is claimed for it." *Id.* This test is based on reasonableness, requiring that the classification scheme at issue "not be palpably and obviously in vain . . . for to classify persons without a chance of result is to classify arbitrarily and without purpose in violation of the very spirit of Art. VI, § 18." *Id.* This language appears to be more stringent and much less popular than the two-part test.

operating a junkyard without a permit in a county with a municipal court, therefore receiving a greater sentence. *Id.* Using the two-part test, the South Dakota Supreme Court struck down the statute. Under the first prong, the Court found that the inequality created by the statute was "completely arbitrary and capricious." *Id.* at 333. The Court then looked to whether there was a rational relationship between the distinctions outlined for counties with municipal courts versus those without and found none. *Id.* at 333–34.

The South Dakota Supreme Court does not always proceed through the full equal protection analysis if the statute survives the first prong. In *Sedlacek*, a plaintiff challenged the statutory exception allowing for sex-segregated activities as unconstitutional under equal protection grounds after she was prevented from participating in a boys-only baseball tournament. 427 N.W.2d at 867. While the trial court looked at the relevant parts of the statutory exception in isolation and found them to be unconstitutional, the Supreme Court viewed the statutory exception in its entirety, and found the legislature intended to preserve historically active sex-segregated programs. *Id.* at 869. The Court found that in reading the exception as a whole, the classifications created by the statute were not arbitrary, therefore meeting the first prong of the equal protection test. *Id.* The Court then held that because the statutory exception survived the first prong by not setting up an arbitrary classification, they did not need to decide what the proper test was for the second prong of the equal protection inquiry. *Id.* The statute was held constitutional on the first prong alone. *Id.*

Further reading of the case law shows that there has been activity in striking down regular legislative categorizations that have no special constitutional status. In *Lyons*, a plaintiff filed a products liability action against two medical companies, and a medical malpractice action against the doctor who prescribed him tetracycline numerous times as a child, which the plaintiff

alleged discolored his teeth. 440 N.W.2d at 769–70. His medical malpractice claims were dismissed at summary judgment as barred under SDCL 15-2-22.1, which restricted the statute of limitations for minors bringing medical malpractice claims if the alleged malpractice occurred while they were under the age of six (as was the case for the plaintiff). *Id.* at 770. The plaintiff challenged as an alternative that SDCL 15-2-22.1 was violative of the equal protection clause. *Id.* On the first prong, the Court found that the statute did not apply equally to all people, and instead created an arbitrary classification that distinguished minors who brought medical malpractice causes of action from minors bringing any other kind of tort claim. *Id.* at 771. The plaintiff's case exemplified the arbitrariness of this distinction: his medical malpractice claim against the doctor was barred, while the product liability action was able to proceed. *Id.* Upon reaching the test's second prong, the Court failed to find any rational basis for the distinction. *Id.* While acknowledging a historical crisis of medical malpractice claims that had perhaps influenced this statute, the Court maintained that there was no rational reason for distinguishing a statute of limitations based on arbitrary age differences, and that it was unlikely medical malpractice claims will diminish "simply by requiring that suits be instituted at an earlier date." *Id.* The statute was held unconstitutional. *Id.* at 772.

However, courts do not always strike down categorizations. In *Krahwinkel*, a defendant challenged his conviction for driving a truck that exceeded the Interstate Highway System's gross weight limits. 2002 SD at ¶¶ 1–2, 656 N.W.2d at 455–56. The defendant argued, among other claims, that the overweight provisions outlined in South Dakota motor vehicle statutes were facially unconstitutional under the federal equal protection clause and Article VI, ¶ 18 because they delineated unequal penalties for identical violations. *Id.* at ¶ 12, 656 N.W.2d at 458. Under the first prong of the *Aberdeen* test, the Court examined whether the overweight truck

statutes set up arbitrary classifications between citizens. *Id.* The defendant argued that the statutory scheme's classifications were arbitrary because the Legislature made distinctions between the types of truckloads, nature of certain vehicles, and kinds of vehicles receiving permits, but these distinctions did not serve the stated statutory purpose of protecting roads from weight damage. *Id.* at ¶ 20, 656 N.W.2d at 460. The Court disagreed, noting that equal protection "requires that the rights of every person be governed by the same rule of law, *under similar circumstances*." *Id.* at ¶ 21, 656 N.W.2d at 460. The statutes at issue fulfilled this by applying equally to those similarly situated: one statute applied equally to all vehicle operators with permits for overweight loads, and the other applied equally to all vehicle operators without a permit; therefore, the classifications were not arbitrary. *Id.* at ¶¶ 21–23, 656 N.W.2d at 461. In analyzing the second prong of the test, the Court found there was a rational relationship between the different weight classifications, which provided exemptions for certain industries, and a legislative purpose. *Id.* at ¶ 23, 656 N.W.2d at 461. Agricultural vehicles received certain exemptions because of "the importance of agriculture to the general welfare," a "substantial sector of commerce in South Dakota." *Id.* at ¶ 24, 656 N.W.2d at 461. Similarly, weight exemptions for emergency vehicles served a legitimate legislative purpose rationally related to public safety. *Id.* at ¶¶ 24–26, 656 N.W.2d at 461–62. The Court concluded that the overweight provisions were constitutional. *Id.* at ¶ 27, 656 N.W.2d at 462.

B. Very few South Dakota cases have received heightened scrutiny review.

Practically every equal protection case reviewed has either found that rational basis was the applicable level of scrutiny or disposed of the challenge on the first equal protection prong. *See Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460; *Lyons*, 440 N.W.2d at 771; *Cheyenne River Sioux Tribe Tel. Auth. v. PUC*, 1999 SD 60, ¶¶ 45–46, 595 N.W.2d 604, 613–14. However, South Dakota courts recognize that there are different levels of scrutiny that can be applied for an

equal protection test. *See, e.g.*, *Davis*, 2004 SD at ¶ 9, 681 N.W.2d at 455 ("A strict reading of [the Privileges and Immunities Clause] is limited to matters involving suspect classes or fundamental rights."). The Court uses the traditional three levels of scrutiny for both federal and state levels: strict scrutiny for fundamental rights or suspect classes, intermediate or substantial relation test for legitimacy and gender, and rational basis for all other classes. *Lyons*, 440 N.W.2d at 771; *see also Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460 ("The statutes [at issue] do not encompass a fundamental right, a suspect classification, or an intermediate scrutiny classification; thus, the rational basis test is applicable.").[5]

There are very few cases in which the South Dakota Supreme Court has applied heightened scrutiny. However, since the Court so often blends federal and state law, it's likely that where heightened scrutiny would improve our argument, we can use federal cases and cite to the use of federal standards in other South Dakota cases to argue that the standard should at least be the same, if not more stringent.

We identified four South Dakota Supreme Court cases that explicitly explored and in some instances seemed to apply intermediate scrutiny in an equal protection challenge. From these cases, it appears the South Dakota courts apply a heightened scrutiny test in this manner: the Court's inquiry "does not focus on the abstract 'fairness' of the statute, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." *In re Estate of Erbe*, 457 N.W.2d 867, 870 (S.D. 1990). The Court will assess whether the statute at issue is "substantially related to

[5] Sometimes, the Court will determine the proper level of scrutiny before engaging in the two-part test. *See Krahwinkel*, 2002 SD at ¶¶ 19–21, 656 N.W.2d at 460–61 (determining the appropriate level of scrutiny is rational basis and then proceeding with the two-prong test); *Cheyenne River Sioux Tribe Tel. Auth.*, 1999 SD at ¶ 45, 595 N.W.2d at 613 (same); *Lyons,* N.W.2d at 771 (addressing Lyons's arguments that age classifications should be subject to intermediate scrutiny before analyzing under the two-part test). But the Court will also sometimes start the two-prong analysis and then turn to the issue of scrutiny after the analyzing the first prong. *See Sedlacek*, 437 N.W.2d at 868–69.

permissible state interests." *Id.* at 869; *Dep't of Soc. Servs. ex rel. Wright v. Beyer*, 2004 SD 41, ¶ 13, 678 N.W.2d 586, 590 ("To comply with the equal protection guarantees, the classification must be substantially related to an important governmental objective."); *Weegar v. Bakeberg*, 527 N.W.2d 676, 678 (S.D. 1995) (striking down statute not substantially related to the state's interests). The statute "must bear some rational relationship to legitimate state purposes" for it to be constitutional. *Erbe*, 457 N.W.2d at 869.

Erbe dealt with an inheritance claim brought by an illegitimate child. *Id.* at 868. The son sought a portion of the inheritance from his presumed father but did not satisfy the requirements of a South Dakota state statute governing the right of an illegitimate child to inherit from their father provided one of the available statutory procedures proving parentage was followed. *Id.* In assessing the statute's constitutionality, the South Dakota Supreme Court began with an acknowledgement that "classifications based on illegitimacy, while not being subject to 'strict scrutiny,' must be substantially related to permissible state interests," and "must bear some rational relationship to legitimate state purposes." *Id.* at 869 (citing *Lalli v. Lalli*, 439 U.S. 259 (1978), and then *Trimble v. Gordon*, 430 U.S. 782 (1977)). The Court noted that the United States Supreme Court has recognized legitimate state interests relating to inheritance (such as the efficient administration of a decedent's estate and avoiding fake inheritance claims), and these state interests apply to the statute in question. *Id.* at 869–70. Given the statute both serves legitimate state interests and provides a way for an illegitimate child to inherit from their father, the Court concluded that the law did not violate equal protection principles. *Id.* at 870.[6]

[6] Notably, the dissent in *Erbe* thought the statute was unconstitutional. *Id.* at 871 (Wuest, C.J., dissenting). For statutes differentiating on the basis of illegitimacy, "we must ascertain whether the statutory classification bears some rational relationship to a legitimate state purpose," as well as examine "whether the statute in question is 'carefully tuned to alternative considerations.'" *Id.* (Wuest, C.J., dissenting) (quoting *Trimble*, 430 U.S. at 772). The statute at issue, according to Chief Justice Wuest, did not bear a rational relationship to the state's interest in orderly descent of property, nor was it to tuned to other considerations. *Id.* (Wuest, C.J., dissenting).

In *Wright*, the South Dakota Supreme Court held that a statutory framework limiting the amount of time to commence a paternity action for children who had presumed fathers to sixty days violated the equal protection clauses of both the South Dakota and United States Constitutions.[7] 2004 SD at ¶ 1, 678 N.W.2d at 587. In its analysis, the Court reviewed *Clark v. Jeter*, a United States Supreme Court case that applied the intermediate scrutiny standard to determine that a paternity statute with a six-year statute of limitation was violative of equal protection, and found the reasons animating *Clark* and a similar Montana state decision were applicable to the case at issue. *Id.* at ¶¶ 8–13, 678 N.W.2d at 589–90. Here, a biological father was able to avoid child support obligations because the child in question had a presumed father and therefore was barred from commencing a paternity action after sixty days, whereas paternity actions in which the child did not have a presumed father had no such bar. *Id.* at ¶ 14, 678 N.W.2d at 590. The Court, while noting the "vital government interest" of "safeguarding children's rights to support," found the statute "discriminatory on its face." *Id.* The Court did not explicitly say the level of scrutiny applicable for the case at issue, but given the Court relied on cases that used an intermediate scrutiny standard, it appears a similar standard was used here.

Two additional cases involved heightened scrutiny tests in the context of paternity actions. *State ex rel. Hove v. Doese*, 501 N.W.2d 366, 371 (S.D. 1993), acknowledged that equal protection claims against statutes of limitation for paternity actions receive heightened scrutiny, specifically citing to the scrutiny test announced in *Clark*. However, the Court ultimately determined that the parties had waived their equal protection claims. *Id.* at 368. The case was decided in favor of the alleged father on the grounds that new legislation expanding South

[7] The Court in *Wright* investigated the equal protection issue *sua sponte*, noting that "[i]n a case like this, it is vitally important" that the constitutionality of the statutes be addressed, given "[c]hild support is just such a vital concern." *Id.* at ¶ 15, 678 N.W.2d at 590.

Dakota statutes of limitation for establishing paternity actions was not retroactive and did not revive a cause of action that was previously barred by the statute of limitations. *Id.* at 371.

Finally, *Weegar* presents a successful equal protection challenge on heightened scrutiny grounds. 527 N.W.2d at 676. A mother brought an action to establish paternity against a putative father living out of state; the trial court dismissed because the action commenced after South Dakota's two-year statute of limitations on establishing paternity. *Id.* at 676–77.[8] The South Dakota Supreme Court first looked at United States Supreme Court cases *Mills v. Halbuetzel* and *Clark*, which applied intermediate scrutiny to knock down one-year and six-year statutes of limitation on paternity actions, and reviewed the *Clark* language on intermediate scrutiny and paternity actions. *Id.* at 677–78. The Court then held that the two-year statute of limitation was not sufficiently long enough to provide "reasonable opportunity" to bring a paternity action, and given the South Dakota Legislature had expanded its own statute of limitations on paternity actions, the limitation at issue here was "not substantially related to the state's interest in avoiding stale or fraudulent claims." *Id.* at 677 (quoting *Clark v. Jeter*, 486 U.S. 456, 462 (1988)). The two-year statute of limitation therefore "fail[ed] the intermediate scrutiny test." *Id.*[9]

The above cases confirm that intermediate scrutiny is applied to certain issues and give some indication as to how South Dakota courts may apply an intermediate scrutiny test. One could argue that this test is applicable to cases involving subjects implicating fundamental rights and vital state interests, like the law we seek to challenge. The language the Court has used to discuss intermediate scrutiny was not explicitly limited to paternity. Given the Court has

[8] While South Dakota had since expanded the time period on its statute of limitations, the issue at stake in *Weegar* was whether the two-year limitation version of the statute, which applied to this case, was constitutional. *Id.* at 677.
[9] Notably, Chief Justice Wuest, who had dissented in *Doese* and *Erbe* on the grounds that the child's equal protection claim should succeed, see *supra* n. 6, wrote the majority opinion in *Weegar*, indicating his view on equal protection applicability to this issue ultimately prevailed.

recognized that challenges involving fundamental rights and vital state interests warrant a higher level of scrutiny than rational basis, perhaps an intermediate scrutiny test could apply to the state laws we wish to challenge.

However, the South Dakota cases that received intermediate scrutiny all deal with paternity disputes, and these cases do not necessarily indicate whether a South Dakota court would apply heightened scrutiny for cases that do not involve parentage issues.[10] It is possible the South Dakota Supreme Court simply follows United States Supreme Court precedent of giving heightened scrutiny for this subject matter. *See Clark*, 486 U.S. at 461–62 (noting the Court's "particular framework for evaluating equal protection challenges to statutes of limitation that apply to suits to establish paternity"); *Mills v. Habluetzel*, 456 U.S. 91, 98–99 (1982) (similar). The South Dakota heightened scrutiny cases do not inherently suggest that South Dakota courts will apply heightened scrutiny to issues that fall outside the narrow paternity sphere. And given almost all the equal protection cases surveyed used rational basis review, perhaps a South Dakota court would only use heightened scrutiny for a protected class or fundamental right that the United States Supreme Court explicitly says requires a heightened scrutiny test.

Conclusion

In reported caselaw, South Dakota state courts have sometimes, though not often, found a statute unconstitutional either as applied or facially in an equal protection context.

[10] The statute the organizational client sought to challenge did not involve issues of paternity or parentage.

Applicant Details

First Name	**Charles**
Last Name	**Tso**
Citizenship Status	**U. S. Citizen**
Email Address	**charlestso2022@nlaw.northwestern.edu**
Address	**Address** Street **311 W 127th Street, Apt. 1105** City **New York** State/Territory **New York** Zip **10027** Country **United States**
Contact Phone Number	**5626085999**

Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2013**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 13, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Northwestern University Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Furst, Bryan
bfurst@cfal.org
212-577-2523 ext. 558

Francoeur, Jocelyn
jocelyn.francoeur@law.northwestern.edu
(312) 503-2218

Zimmerman, Clifford
c-zimmerman@law.northwestern.edu
(312) 503-7043

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Charles Tso
311 W 127th Street, Apt. 1105
New York, NY 10027
(562) 608-5999
charlestso2022@nlaw.northwestern.edu

April 27, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

Enclosed please find my application for a clerkship in your chambers starting in 2025. I am a litigation associate at Morrison Foerster with an interest in trial litigation and will clerk for Judge Susan Wigenton in the District of New Jersey for the 2023-24 term. I intend to return to public service after my clerkship having had a formative experience working in government before law school. I am interested in clerking for you because of your background as a federal prosecutor, a path I hope to pursue as it will give me the opportunity to gain both trial and appellate experience.

I developed an interest in clerking during my summer internship with Judge Sterling Johnson, Jr. in the Eastern District of New York. Despite our remote work setting, my ability to work independently and manage competing priorities earned me the judge's trust and the responsibility to draft a class certification order. Later, as an intern at the Securities and Exchange Commission and the Department of Justice's Fraud Section, I gained insight into government investigation and enforcement actions and reaffirmed my desire to pursue a career in public service after clerking.

My application includes a resume, transcript, and writing sample. Letters of recommendation from the following individuals have been added to the application:

Professor Jocelyn Francoeur, Northwestern Pritzker School of Law
jocelyn.francoeur@law.northwestern.edu; (312) 503-2218

Bryan Furst, Center for Appellate Litigation
bryansfurst@gmail.com; (206) 465-2217

Professor Cliff Zimmerman, Northwestern Pritzker School of Law
c-zimmerman@law.northwestern.edu; (312) 503-7043

I would value the opportunity to interview with you for this position. Please contact me if I may provide any additional information in support of my candidacy.

Respectfully,
Charles Tso

CHARLES TSO

311 W 127th Street, Apt. 1105 | New York, NY 10027 | (562) 608-5999 | charlestso2022@nlaw.northwestern.edu

EDUCATION

Northwestern Pritzker School of Law Chicago, IL
Juris Doctor, *cum laude*, May 2022
GPA: 3.871 (Dean's List All Semesters)
- NORTHWESTERN UNIVERSITY LAW REVIEW, Notes Editor, Vol. 116
- Research Assistant, Professor Cliff Zimmerman (Anti-Discrimination Law)
- Bluhm Legal Clinic, Center on Wrongful Convictions, Student Attorney

Fordham University School of Law New York, NY
Completed First-Year Juris Doctor Curriculum, August 2019 – May 2020
GPA: 3.556
- FORDHAM URBAN LAW JOURNAL (invited)
- Research Assistant, Fordham Urban Law Center

University of Michigan Ann Arbor, MI
Master of Urban Planning, May 2015
- Research Assistant, Professor Jonathan Levine

University of California, Los Angeles Los Angeles, CA
Bachelor of Arts in Geography, *with Departmental Honors*, June 2013

EXPERIENCE

United States District Court for the District of New Jersey Newark, NJ
Law Clerk to the Honorable Susan D. Wigenton, August 2023 – August 2024

Morrison & Foerster, LLP New York, NY
Litigation Associate, October 2022 – Present
Summer Associate, May – July 2021
- Research and draft memoranda on legal issues for matters related to class action, arbitration, securities litigation, breach of contract, corporate governance, and investigations by the DOJ and the SEC
- Pro Bono: represent a disability rights non-profit litigating Connecticut's use of in-cell shackles on prisoners with mental illness in federal court; represent hate-crime victims in preparing a federal anti-discrimination action against a white supremacist group

United States Department of Justice, Criminal Division Washington, D.C.
Legal Intern, *Fraud Section*, January – April 2022
- Researched and drafted memoranda to assist with prosecuting securities and health care frauds

United States Securities and Exchange Commission Chicago, IL
Student Honors Intern, August – November 2021
- Drafted motions in limine and memoranda for securities fraud litigation

United States District Court for the Eastern District of New York New York, NY
Judicial Intern to the Honorable Sterling Johnson, Jr., June – August 2020
- Researched and drafted a class certification order for a consumer class action and memoranda on various legal issues, such as compassionate release due to COVID-19 and subject matter jurisdiction

City of Wilsonville Wilsonville, OR
City Planner, November 2016 – July 2019
- Reviewed residential and commercial development to ensure compliance with state and local land use law

ADDITIONAL INFORMATION

Languages / **Interests**: Mandarin Chinese (Fluent), running, bowling, cooking, coffee, cycling, playing guitar

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Tso,Charles
Student ID: 3304240

School of Law Official Transcript

Print Date: 07/04/2022
Staff Member, NU Law Review (2020-21)
Notes Editor, NU Law Review (2021-22)

Degrees Awarded

Degree: Juris Doctor
Confer Date: 06/17/2022
Degree Honors: Cum Laude
Plan: Juris Doctor Major

Academic Program History

Program: **Juris Doctor**
07/20/2020: **Active in Program**
06/17/2022: **Completed Program**

Beginning of Law Record

2020 Fall (08/24/2020 - 12/17/2020)

Transfer Credit from FORDHAM UNIVERSITY SCHOOL OF LAW
Applied Toward Juris Doctor Program

Course		Description	Attempted	Earned	Grade	Points
BUSCOM	510	Contracts	3.000	3.000	T	0.000
CONPUB	500	Constitutional Law	3.000	3.000	T	0.000
CRIM	520	Criminal Law	3.000	3.000	T	0.000
LAWSTUDY	540	Communication& Legal Reasoning	2.000	2.000	T	0.000
LAWSTUDY	541	Communication& Legal Reasoning	2.000	2.000	T	0.000
LAWSTUDY	TRNSF	General Law Transfer Credit	6.000	6.000	T	0.000
LITARB	530	Civil Procedure	3.000	3.000	T	0.000
PPTYTORT	530	Property	3.000	3.000	T	0.000
PPTYTORT	550	Torts	3.000	3.000	T	0.000
		Transfer Totals	30.000	30.000		0.000

Course		Description	Attempted	Earned	Grade	Points
BUSCOM	629	Employment Law	3.000	3.000	B+	9.990
Instructor:		Susan Provenzano				
CONPUB	650	Federal Jurisdiction	3.000	3.000	A-	11.010
Instructor:		James Pfander				
CONPUB	734	Anti-Discrimination Law	3.000	3.000	A	12.000
Instructor:		Clifford Zimmerman				
LAWSTUDY	620	Advanced Legal Research	2.000	2.000	A	8.000
Instructor:		Clare Willis				

Term Honor: Dean's List

			Attempted	Earned	GPA Units	Points
Term GPA	3.727	Term Totals	11.000	11.000	11.000	41.000
Cum GPA	3.727	Cum Totals	39.000	39.000	11.000	41.000

2021 Winter (12/19/2020 - 01/02/2021)

Course		Description	Attempted	Earned	Grade	Points
BUSCOM	738	Nego. a Joint Venture in China	2.000	2.000	A-	7.340
Instructor:		Nestor Gounaris				

			Attempted	Earned	GPA Units	Points
Term GPA	3.670	Term Totals	2.000	2.000	2.000	7.340
Cum GPA	3.718	Cum Totals	41.000	41.000	13.000	48.340

2021 Spring (01/11/2021 - 05/06/2021)

Course		Description	Attempted	Earned	Grade	Points
BUSCOM	637	Entertainment Law	3.000	3.000	A+	12.990
Instructor:		Samuel Fifer				
CRIM	610	Constitutional Crim Procedure	3.000	3.000	B+	9.990
Instructor:		Meredith Rountree				
LAWSTUDY	669	Adv Legal Reasoning: Fed Sent	2.000	2.000	A	8.000
Instructor:		Jocelyn Francoeur				
LAWSTUDY	710	Privacy Law	3.000	3.000	A	12.000
Instructor:		Matthew Kugler				
LITARB	743	Legal Ethics in Motion	3.000	3.000	A	12.000
Instructor:		Wendy Muchman				

Term Honor: Dean's List

			Attempted	Earned	GPA Units	Points
Term GPA	3.927	Term Totals	14.000	14.000	14.000	54.980
Cum GPA	3.827	Cum Totals	55.000	55.000	27.000	103.320

2021 Summer (05/10/2021 - 08/20/2021)

Course		Description	Attempted	Earned	Grade	Points
LAWSTUDY	699	Summer Research Internship	2.000	2.000	CR	0.000
Instructor:		Clifford Zimmerman				

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	2.000	2.000	0.000	0.000
Cum GPA	3.827	Cum Totals	57.000	57.000	27.000	103.320

2021 Fall (08/30/2021 - 12/16/2021)

Course		Description	Attempted	Earned	Grade	Points
CONPUB	656	Practicum: Civil Government	4.000	4.000	A	16.000
Instructor:		Maureen Stratton				
CRIM	620	Criminal Process	3.000	3.000	A-	11.010
Instructor:		Meredith Rountree				
LITARB	601	Legal Ethics & Prof'l Resp	3.000	3.000	A	12.000
Instructor:		Wendy Muchman				
LITARB	612	Strategy of Litigation	2.000	2.000	B+	6.660
Instructor:		Alan Salpeter				
LITARB	616	Pre-Trial Advocacy	2.000	2.000	A+	8.660
Instructor:		Michael Mayer Andrew Shapiro				

Term Honor: Dean's List

			Attempted	Earned	GPA Units	Points
Term GPA	3.881	Term Totals	14.000	14.000	14.000	54.330
Cum GPA	3.845	Cum Totals	71.000	71.000	41.000	157.650

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Tso,Charles
Student ID: 3304240

School of Law Official Transcript

2022 Winter (12/17/2021 - 01/09/2022)

Course		Description	Attempted	Earned	Grade	Points
CONPUB	743	The Law of Whistleblowing	2.000	2.000	A	8.000
Instructor:		Wendy Muchman Mary Foster				

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	2.000	2.000	2.000	8.000
Cum GPA	3.852	Cum Totals	73.000	73.000	43.000	165.650

2022 Spring (01/10/2022 - 05/05/2022)

Course		Description	Attempted	Earned	Grade	Points
CRIM	608	Practicum: Criminal Law	4.000	4.000	A	16.000
Instructor:		Scott Main				
LITARB	621	Appellate Advocacy	3.000	3.000	A	12.000
Instructor:		Meredith Rountree				
LITARB	635	Evidence	3.000	3.000	A-	11.010
Instructor:		Jonathan Koehler				
LITARB	708	Clinic: Wrongful Convictions	4.000	4.000	A	16.000
Instructor:		Steven Drizin Laura Nirider				

Term Honor: Dean's List

			Attempted	Earned	GPA Units	Points
Term GPA	3.929	Term Totals	14.000	14.000	14.000	55.010
Cum GPA	3.871	Cum Totals	87.000	87.000	57.000	220.660

End of School of Law Official Transcript

FORDHAM UNIVERSITY
THE SCHOOL OF LAW
150 WEST 62nd STREET NEW YORK, NY 10023

Name: Charles Y. Tso

Student ID: A17668613 **DOB:** [redacted] **SSN:** *** - ** - [redacted]

Previous Institution(s):
UNIVERSITY OF MICHIGAN
UNIV CALIF LOS ANGELES Sep 2013 - Apr 2015
Sep 2009 - Jun 2013

COURSE #	COURSE TITLE	CRED	GRD	PTS	ICOURSE #	COURSE TITLE	CRED	GRD	PTS
Course Level: Juris Doctor									
Current Program									
Juris Doctor									
College : Law School									
Major : Law Day									
INSTITUTION CREDIT:									
Fall 2019									
Law School									
Law Day									
1st time adm at level-mat only									
CNGL 0104	Contracts 5	5.000	A	20.000					
CRGL 0103	Criminal Law 5 and 6	3.000	B	9.000					
LTGL 0106	Legal Writing/Resrch 5B	3.000	A-	11.001					
LWGL 0105	Legal Proc and Quant Meth 5	1.000	P	.000					
TOGL 0108	Torts 5 and 6	4.000	B+	13.332					
Ehrs:	16.000 QPts:	53.333							
GPA-Hrs:	15.000 GPA:	3.556							
Spring 2020									
Grades are not included in GPA due to the coronavirus.									
Law School									
Law Day									
Continuing Registration									
CVGL 0101	Civil Procedure 5 and 6	4.000	P	.000					
FCGL 0102	Constitutional Law 5 and 6	4.000	P	.000					
FCGL 0129	Legislation & Regulation 5 & 6	4.000	P	.000					
LTGL 0106	Legal Writing and Research 5B	3.000	P	.000					
PRGL 0107	Property 5 and 6	4.000	P	.000					
Ehrs:	16.000 QPts:	0.000							
GPA-Hrs:	0.000 GPA:	0.000							
********** TRANSCRIPT TOTALS **********									
INSTITUTION Ehrs:	32.000 QPts:	53.333							
GPA-Hrs:	15.000 GPA:	3.556							
TRANSFER Ehrs:	0.000 QPts:	0.000							
GPA-Hrs:	0.000 GPA:	0.000							
OVERALL Ehrs:	32.000 QPts:	53.333							
GPA-Hrs:	15.000 GPA:	3.556							
********** END OF TRANSCRIPT **********									

CHARLES TSO

Vanessa C. Garcia
Vanessa C. Garcia
Assistant Dean and Registrar, School of Law

Not considered official without Seal or Registrar's Signature.

Date Issued: 01-JUN-2020 Page: 1

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write this letter in support of Charles Tso's clerkship application. I had the good fortune to supervise Charles as a summer intern while clerking for Judge Sterling Johnson in the Eastern District of New York in 2020. I am currently an appellate public defender in New York City at the Center for Appellate Litigation.

Among many interns in chambers that year, Charles quickly set himself apart through his ability to research thorny legal issues and to write in a voice far beyond that of most first-year law students. He earned my trust through his excellent work product to the point that I tasked him with writing the first draft of a major class certification order—an assignment that a first year intern would not ordinarily receive. He did not disappoint.

On a tight timeline, Charles familiarized himself with the record, performed the requisite legal research, and wrote a succinct draft that clearly applied the law. I would not have guessed that he had never encountered FRCP Rule 23 before, as we were soon deep in the weeds, discussing the merits of the motion before us. While the final order was much longer than his draft, due to additional related motions by both parties, most of the class certification discussion ultimately approved by Judge was language written by Charles.

I have found that most legal interns, particularly 1Ls, require a great deal of supervision. With a busy docket, providing them with a good experience can be incredibly time consuming. However, a small number stand apart and are unequivocally a net positive to the work environment. Charles was such an intern and could not have come at a better time considering the challenges of 2020. That summer, my attention was largely on the flurry of compassionate release motions we received from incarcerated individuals at high risk of severe illness from COVID-19. Thankfully, Charles produced high quality work with minimal supervision inherent to a remote work environment.

Finally, Charles' attitude and curiosity made him a pleasure to work with. In the height of the pandemic, he was a calming presence with a great sense of humor. He also evinced an interest in the law that exceeded the bounds of his assignments and led to many conversations about cases in the Second Circuit and the U.S. Sentencing Commission. Through these conversations, I've learned that Charles' concern for the public interest and curiosity for the law are both genuine.

Charles' written work product after just one year of legal education was remarkable. I have no doubt he has only continued to improve since. Without hesitation, I recommend him for a clerkship position in your chambers. Please do not hesitate to reach out if you'd like to discuss his application further.

Sincerely,

Bryan Furst
(206) 465-2217
bryansfurst@gmail.com

NORTHWESTERN PRITZKER SCHOOL OF LAW

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in enthusiastic support of Charles Tso's application for a clerkship in your chambers.

I met Charles in the spring of 2021, when he enrolled in my Federal Sentencing seminar. The class had only 15 students and focused on the intersection of sentencing theory and practice. From the first class, Charles distinguished himself as an exceptional student. He was consistently prepared and thoughtful in class and offered concise insights without dominating the conversation (something not all students can do!). When Charles spoke, he always added value – drawing threads from one case to another, building on a classmate's comment, asking excellent questions of guest speakers. Students completed a midterm examination and a final paper in the class, and Charles received A grades on both for his excellent analysis and exposition.

I recognize that all of the accolades set forth in the preceding paragraph can apply to any number of A-level students, but in my experience Charles has something that many of those students do not – a genuine intellectual curiosity. Throughout my class, Charles would send articles he had read or podcasts he had listened to that elaborated on the class content. It was clear to me that Charles was not sending these materials for extra credit, or to impress me; he was simply engaged with the class topic and the material we discussed, and he continued his exploration outside of class hours. Charles's contributions delighted me, and as a first-time instructor of this particular topic I incorporated many of his finds into class discussions (and will include them in the syllabus going forward). Although the work product in my class did not require outside research, Charles's thoughtful curation of outside resources (in addition, of course, to his work on the Law Review!) demonstrates that his approach to challenging topics will be both thoughtful and thorough.

Finally, I have enjoyed getting to know Charles on a personal level throughout the last few months, and in addition to all of the strengths described above I can affirm that he is a kind, warm person who converses easily and displays interest in others. I frequently witnessed Charles jumping in to help a struggling student in class, and in our conversations he provided keen insight about the class structure and dynamic. I have very much enjoyed working with him, and I believe he would be an exceptional asset to any chambers.

Please feel free to contact me should you have any questions or need additional information.

Very truly yours,
Jocelyn D. Francoeur
Director, Academic and Professional Excellence Program
Instructor of Law
Northwestern Pritzker School of Law

Jocelyn Francoeur - jocelyn.francoeur@law.northwestern.edu - (312) 503-2218

NORTHWESTERN PRITZKER SCHOOL OF LAW

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is my pleasure to give my highest recommendation for Charles Tso as a judicial clerk in your chambers. Charles was in my Anti-Discrimination Law course in the Fall 2020 semester and works as my research assistant this summer. As both a student and an employee, Charles has distinguished himself apart from his peers with his exceptional analytical and communication skills, unwavering work-ethic and drive, and sincere intellectual curiosity in the law. Charles is also nice, engaging, and warm, all with a good sense of humor.

Anti-Discrimination Law (ADL) was a virtual course in Fall 2020 due to the pandemic. Students had only experienced remote learning for a couple of weeks in the Spring term. The course delved deeply into the policy aims of ADL, its constitutional foundations, judicial interpretations of the statutes, and how and whether ADL is effective in addressing discrimination. In these tough and sensitive explorations, the students had to participate in class, write reflection papers, work as a team to analyze a Complaint, and write an analytical paper arguing how to amend a statute of their choosing to make it work truer to its purpose. Charles embraced and excelled in each of these challenges – so much so that I was thrilled by his interest in being a research assistant this summer and hired him in an instant.

Charles was a regular and most thoughtful participant in ADL. His comments enriched the learning experience not only through the substance of his remarks and engagement of the course materials but also in his thoughtful engagement with his classmates' ideas. I especially appreciated Charles's perspective as a former city planner when we discussed discrimination in public accommodation and zoning. Based on his performance in class and our conversations during office hours, I can say that Charles has demonstrated both the aptitude and appetite for understanding the breadth, complexity, and practical implications of anti-discrimination law jurisprudence.

Charles' research assistance this summer has reinforced my views on his abilities. When thinking about how best to use Charles' skills and aid me in the course development, I asked him to examine the syllabus, breaking down and critiquing the readings. His deep understanding of and appreciation for how I teach the course, how I use the materials, and how the assignments fit with the readings has enabled him to provide invaluable insight from the student perspective and will make the course stronger when I teach it in the coming year. Charles is extraordinarily self-directed, detail-oriented, and effective. First, Charles has proven his ability to deliver accurate results on time with minimal supervision. Even though he is working full-time at a law firm this summer, he has always balanced his time and effort. Second, he has demonstrated excellent communication and listening skills by providing insightful recommendations for my class and taking constructive critiques (which are few) with gratitude and grace. When he identifies areas of the class that can be improved, he explains what should be changed and why, and suggests solutions. Our conversations in this respect are deep, insightful, and thoroughly enjoyable. Third, I have especially appreciated his self-initiative and management skill as demonstrated by his effective file organization system, timely progress updates, and clear presentation of his thoughts on the materials, both those in current use and alternatives he has found for my consideration.

Charles is among the top students I have taught at Northwestern. Charles has demonstrated his superior skills in legal analysis and writing in his paper for ADL. Driven by his former experience as a city planner, Charles's paper thoughtfully addressed the lack of clear and uniform judicial application of the Fair Housing Act to protect tenants from post-acquisition discrimination and impute landlord liability for co-tenant harassment and proposed legislative solutions to clarify and strengthen the FHA. Charles possesses an impressive ability to balance many competing priorities and succeed under high levels of stress and uncertainty. Despite the challenges that come with being a transfer student in a fully virtual environment, Charles was always focused and prepared for class discussions all the while actively contributing to the Northwestern University Law Review and doing independent research for his case comment.

Having worked in a small, intimate office environment when I first practiced law, I can say wholeheartedly that Charles would be an invaluable asset in your judicial chamber and a valued colleague to your other staff. It is a genuine pleasure and honor for me to give my highest recommendation for Charles. If you have any further questions with regard to his background or qualifications, please do not hesitate to call me.

Respectfully,

Clifford Zimmerman
Professor of Practice
Northwestern Pritzker School of Law

Clifford Zimmerman - c-zimmerman@law.northwestern.edu - (312) 503-7043

Clifford Zimmerman - c-zimmerman@law.northwestern.edu - (312) 503-7043

WRITING SAMPLE

Charles Tso
311 W 127th Street, Apt. 1105
New York, NY 10027
(562) 608-5999
charlestso2022@nlaw.northwestern.edu

This appellate brief was written and lightly edited solely by me for my Appellate Advocacy class taught by Professor Meredith Rountree at Northwestern Pritzker School of Law. The assignment required outside research and adherence to the Bluebook citation format. This is an excerpted version of the full brief and is submitted with Professor Rountree's permission.

A16-1936

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

v.

Richard Henry,

Appellant.

RESPONDENT'S BRIEF

ISSUE STATEMENT

Whether this Court should adopt a new legal test for evaluating the admissibility of eyewitness identification evidence under Minnesota's Due Process Clause.

***

STATEMENT OF THE CASE

On February 12, 2016, a grand jury indicted Appellant Richard Henry on one count of burglary in the first degree in violation of Section 609.582(1)(a) of the Minnesota Statutes. Minn.Stat. § 609.582 (2006). On August 6, 2016, the trial court held a Rasmussen hearing and denied Henry's motion to suppress eyewitness identification evidence. This case proceeded to trial on October 15, 2016, when the jury convicted Henry on one count of burglary in the first degree. The eyewitness's testimony and pretrial identification of Henry were the only evidence tying Henry to the crime. The trial court issued a jury instruction on eyewitness credibility, to which neither party objected. On October 27, 2016, Henry was sentenced to fifty-one months'

imprisonment. He filed a timely notice of appeal of his conviction. The Court of Appeals affirmed. Henry timely filed his Petition for Review on February 7, 2018. On April 6, 2018, the Minnesota Supreme Court granted review.

***

ARGUMENT

I. This Court Should Uphold *Ostrem* as the Test for Determining the Admissibility of Eyewitness Identification Evidence

"Due process prohibits the admission of eyewitness identifications obtained through unnecessarily suggestive police procedures that create a substantial likelihood of misidentification." *State v. Hill*, 871 N.W.2d 900, 907 (Minn. 2015). To determine the admissibility of eyewitness identification, the Minnesota Supreme Court adopted in *State v. Ostrem* a two-part test articulated in *Manson v. Braithwaite*, 432 U.S. 98 (1977). 535 N.W.2d 916, 921 (Minn. 1995). First, courts evaluate whether the identification procedure is "unnecessarily suggestive." *Id*. Second, if the procedure is unnecessarily suggestive, the identification is admissible only if the evidence has "adequate independent origin" and therefore is reliable under the totality of the circumstances. Courts evaluate five factors to determine the totality of the circumstances: (1) the opportunity to view the suspect at the time of the crime; (2) the eyewitness's degree of attention; (3) the accuracy of the eyewitness's prior description of the suspect; (4) the level of certainty demonstrated by the eyewitness at the photo array; and (5) the time between the crime and the identification. *Id*.; *see Manson,* 432 U.S. at 114.

Currently, forty-one states and the District of Columbia follow the *Manson* framework, whereas only nine states have adopted a different test. *See* Lawrence Rosenthal, *Eyewitness Identification and the Problematics of Blackstonian Reform of the Criminal Law*, 110 J. Crim. L. & Criminology 181, 194–98, 205–06 & nn.132–33 (2020). Notably, Wisconsin returned to the

Manson framework concluding that its prior decision to adopt a new test based on social science was "unsound in principle" because "social science research cannot be used to define the meaning of a constitutional provision." *State v. Roberson*, 935 N.W.2d 813, 816, 820 (Wis. 2019) (abrogating *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005)).

For almost three decades, Minnesota courts have relied on *Ostrem* to balance a criminal defendant's due process rights with the State's legitimate interest in prosecuting criminal conduct, *see Alexander v. Severson*, 408 N.W.2d 195, 199 (Minn. Ct. App. 1987), and the truth-finding function of the criminal justice system. *See United States v. Leon*, 468 U.S. 897, 898 (1984). Appellant's argument that *Ostrem* must be overruled relies on social science research on human memory and a misconception of due process's scope in the context of eyewitness identification. Social science, however, cannot be the basis for creating new constitutional standards. Replacing *Ostrem* with a social science-based test will undermine confidence in the jury and principles of constitutional law. Accordingly, this Court should uphold *Ostrem*.

A. Standard of Review

Questions of constitutional law are reviewed *de novo* on appeal. *State v. Hunn*, 911 N.W.2d 816 (Minn. 2018).

B. The *Ostrem* Test is Consistent with the Due Process Clause under the Minnesota and the United States Constitutions

Ostrem mirrors the two-step test announced in *Manson*, which has been the constitutional standard for eyewitness identification evidence for forty-five years. This Court has asked whether it should replace *Ostrem* with a new standard. Appellant argues that *Ostrem* should be overruled because it has failed to ensure reliability in identification evidence. This position rests on a misguided view of the relationship between due process and eyewitness identification. In urging this Court adopt a new test, Appellant advances an extraordinary version of due process that

neither this Court nor the United States Supreme Court has ever recognized. Because there is no principled basis to break uniformity with the federal constitution and afford broader protections under the Minnesota Due Process Clause, this Court should uphold *Ostrem*.

1. Admission of unreliable identification evidence alone, without intentional police misconduct, does not violate due process

Although due process guarantees the right of "every criminal defendant to be treated with fundamental fairness," *State v. Netland*, 762 N.W.2d 202, 208 (Minn. 2009), it does not achieve that end by imposing a special constitutional requirement that identification evidence must be deemed reliable by a trial judge before the jury can assess its credibility. Appellant performs impressive legal and logical gymnastics, contorting the boundary of due process and stretching eyewitness identification's constitutional stature. Appellant's view has no place in the due process jurisprudence of the United State Supreme Court or this Court, as the latter has held that the due process protections under federal and Minnesota constitutions are identical. *State v. Holloway*, 916 N.W.2d 338, 344 (Minn. 2018).

a. Fundamental fairness is a carefully tailored constitutional protection incompatible with Appellant's position

The United States Supreme Court has narrowly tailored the due process limit on the admissibility of evidence, emphasizing that the aim of due process is "not to exclude presumptively false evidence, but to prevent fundamental unfairness in the *use* of evidence, whether true or false." *Colorado v. Connelly,* 479 U.S. 157, 167 (1986) (emphasis added). Where the "crucial element of police overreaching" is missing, reliability is "a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment." *Id.* at 163, 167 (internal citation omitted).

The United States Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly," noting that "[b]eyond the specific guarantees enumerated

in the Bill of Rights, the Due Process Clause has limited operation." *Dowling v. United States*, 493 U.S. 342, 352 (1990). Fundamental unfairness arises when the State deliberately interferes with the jury's ability to decide the case fairly, transforming the trial into "a hollow formality." *Murphy v. Florida*, 421 U.S. 794, 799 (1975). This type of due process violation occurs, for example, when the State knowingly presents false evidence that pertains to a witness's credibility and fails to correct it, *Napue v. Illinois*, 360 U.S. 264, 269 (1959), when the State convicts a criminal defendant by obtaining his involuntary confession through physical or mental coercion, *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960), and when the State withholds from a criminal defendant favorable evidence that is material to guilt or punishment, *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

The United States Supreme Court has acknowledged that "[m]ost eyewitness identifications involve some element of suggestion." *Perry v. New Hampshire*, 565 U.S. 228, 244 (2012). Thus, the key inquiry is when does a procedure become impermissibly suggestive as to violate due process. The only case to date in which the United States Supreme Court has found an identification procedure to violate due process is *Foster v. California*, 394 U.S. 440, 443 (1969), where an eyewitness, who initially failed to identify the defendant, made a positive identification after the police conducted three separate suggestive identification procedures. *See Perry,* 565 U.S. at 261 (Sotomayor, J., dissenting). Decided in the same era as the other due process cases discussed above, *Foster* did not hold that the admission of unreliable identification violates due process. Rather, *Foster* held that it is a denial of due process when a police-arranged procedure is so "unnecessarily suggestive" as to make the identification of the defendant "all but inevitable." 394 U.S. at 443. Therefore, due process's fundamental fairness guarantee is reserved for a small group of extreme cases where the State's egregious, intentional misconduct creates "a substantial likelihood of irreparable misidentification." *Manson*, 432 U.S. at 107.

The due process protection provided under the Minnesota Constitution is "identical to the due process guaranteed under the Constitution of the United States." *Holloway*, 916 N.W.2d at 344. Like the United States Supreme Court, this Court is "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Hill*, 871 N.W.2d at 905–06; *accord Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

Under this Court's jurisprudence, fundamental fairness is violated where the State's action is so "egregious" that it "shocks the conscience." *Netland*, 762 N.W.2d at 209–10. Only "the most extreme instances of governmental misconduct . . . evincing deliberate and unjustifiable injurious intent" can satisfy "this exacting standard." *Hill*, 871 N.W.2d at 906; *see Netland*, 762 N.W.2d at 210 ("Such behavior has generally included acts with an intent to injure or cause harm."). In other words, conscience-shocking misconduct that violates fundamental fairness is generally caused by bad faith. *Cf. State v. Bailey*, 677 N.W.2d 380, 393 (Minn. 2004) (holding that the police's failure to preserve potentially useful evidence collected during a criminal investigation does not violate due process absent bad faith).

In *Hill*, this Court held that due process did not require a rebuttable presumption of unreliability when a police crime lab handled evidence of controlled substance without a standardized procedure and quality control. 871 N.W.2d at 907. The Court reasoned that unreliability need not be presumed because "there is neither evidence of palpable harmful intent nor blatantly egregious behavior that meets the shocks-the-conscience standard." *Id*. at 908.

This case is close to *Hill* and far from *Foster*. The police-arranged identification procedure in this case was imperfect, but it did not rise to conscience-shocking misconduct as to require the exclusion of the eyewitness's identification. *Compare Brown v. Mississippi,* 297 U.S. 278, 282–85 (1936) (concluding that the torturous whipping used by the sheriff to compel the

confessions of petitioners, was "a clear denial of due process"), *with Neil v. Biggers*, 409 U.S. 188, 199 (1972) (concluding that while the police "did not exhaust all possibilities" in arranging a fairer lineup, "we do not think that the evidence must therefore be excluded"). Sergeant Tate followed the same protocol she uses for all of her cases when she administered the photo array. (R. 14). Although she could have arranged a less suggestive procedure, she took steps to ensure that Appellant did not stand out. (R. 19). The record contains no evidence of bad faith or deliberate interference with the eyewitness's identification to unfairly single out Appellant. (R. 13–21). The procedure was not unnecessarily suggestive and did not turn Appellant's trial into a "hollow formality." Therefore, the *Ostrem* test adequately protected Appellant's due process rights and should be reaffirmed.

b. The due process concern in Manson was the corrupting effect of police misconduct on eyewitness identification, not its reliability

This Court should not abandon the *Ostrem* test because it was never designed to guarantee that only reliable eyewitness identifications can be considered by the jury. Consistent with the limited scope of due process's fundamental fairness protection, the primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement's use of improper identification procedures in the first place, not to exclude all unreliable eyewitness testimony. *See Manson*, 432 U.S. at 112; *see also Perry*, 565 U.S. at 242 ("[T]he Court has linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification.").

In other words, "reliability is the linchpin in determining the admissibility of identification testimony" *only* when a court finds that the police had used an unnecessarily suggestive procedure to obtain the identification. *Manson*, 432 U.S. at 114. Appellant recasts

Manson to fit his social science theories and attributes to it "a meaning that a fair reading of the opinion does not bear." *Perry*, 565 U.S. at 241. "The due process check for reliability comes into play only after the defendant establishes improper police conduct," which Appellant has failed to do. *Id*. Thus, there is no reason to overturn *Ostrem* because it continues to live up to its purpose.

Although curbing police rigging was its main concern, the *Manson* Court held that a totality approach for eyewitness identification strikes an appropriate balance between several important interests: the concern that evidence should have some aspects of reliability to be heard by the jury, deterrence against police misconduct, and the administration of justice. *Id*. at 111–13. Supplanting *Ostrem* with a social science-based test will disrupt this balance that is vital to the functioning of our criminal justice system.

c. The United States Supreme Court has reaffirmed Manson even after taking modern science into consideration

Just ten years ago, the United States Supreme Court had the opportunity to revise the *Manson* test in *Perry*. 565 U.S. at 232. The *Perry* Court had at its fingertips volumes of social science findings on the fallibility of human memory—many of which Appellant cites. But scientific evidence did not persuade the *Perry* Court to abandon *Manson*. While "[t]he vagaries of eyewitness identification are well-known," *United States v. Wade*, 388 U.S. 218, 228 (1967), *Perry* held that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." 565 U.S. at 245.

The *Perry* court's holding rests, in part, on the fact that an accused has adequate safeguards to ensure a fair trial. *Id*. at 237. These protections include a criminal defendant's Sixth Amendment right to confront witnesses and test the reliability of witness testimony through cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 67 (2004) ("The Constitution

prescribes a procedure for determining the reliability of testimony in criminal trials, and [judges] lack authority to replace it with one of our own devising."); *State v. Mosley*, 853 N.W.2d 789, 799 (Minn. 2014) (noting that "effective cross-examination" is one of the "safeguards available to prevent convictions of the innocent based on unreliable eyewitness identification"). Another is a criminal defendant's right to the effective assistance of counsel, who can educate the jury about the fallibility of eyewitness memory. *See Perry*, 565 U.S. at 246; *Mosley*, 853 N.W.2d at 799.

An accused also has the right to call and examine expert witnesses, subject to the limitations imposed by the rules of evidence. *See* Minn. R. Evid. 702; *see also Perry*, 565 U.S. at 247; *Mosley*, 853 N.W.2d at 798. Lastly, eyewitness-specific jury instructions, such as the one given by the trial court in this case, can likewise advise the jury of the relevant factors to consider in appraising identification evidence. *See Perry*, 565 U.S. at 247; *see also* 10 Minnesota Dist. Judges Ass'n, Minnesota Practice – Jury Instruction Guides § 3.12, at 44 (5th ed. 2006).

These protections—crucial to *Perry*'s holding—are guaranteed to all criminal defendants under Minnesota law and were available to Appellant during his trial. To replace *Ostrem* with a social science-based test would entail "a vast enlargement of due process as a constraint on the admission of evidence," an outcome *Perry* explicitly rejected. 565 U.S. at 244. There is no justification for this extraordinary step because our trial process already affords criminal defendants the means to caution juries against giving undue weight to evidence of questionable reliability. Thus, *Ostrem* is consistent with due process under both the United States and Minnesota Constitutions and should be upheld.

C. Overruling *Ostrem* Will Undermine the Jury's Role as the Judge of Eyewitness Credibility

Overturning *Ostrem* will erode our confidence in the jury and stability of our criminal justice system. Appellant's test will require trial judges to make pre-trial determinations on the

reliability of eyewitness identification, substituting the jury's judgment on eyewitness credibility with criteria developed by social scientists. This Court should prevent a judicial invasion of the jury's province to make credibility determinations and uphold *Ostrem*.

The American jury's role as the trier of fact distinguishes our criminal justice system from that of other nations. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). The right of a defendant to be tried by "a jury of his peers" is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Williams v. Florida*, 399 U.S. 78, 100 (1970). Because the jury plays an essential role in our criminal adjudication process, subversion of confidence in the jury is subversion of the legitimacy of our criminal justice system.

The United States Supreme Court stated in *Perry* that its "unwillingness to enlarge the domain of due process . . . rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence." 565 U.S. at 245. Similarly, this Court has held that "the jury should be the sole judge of whether a witness is to be believed and the weight to be given to the witness's testimony." *State v. Reese*, 692 N.W.2d 736, 742 (Minn. 2005); *see State v. Myers*, 359 N.W.2d 604, 609–10 (Minn. 1984) ("[T]he credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility.").

The *Ostrem* test balances a criminal defendant's due process rights with our preference for the jury to be the sole judge of witness credibility. *See* Committee Comment, Minnesota Rule of Evidence 104 ("Questions of fact are deemed to be appropriate for jury determination. To permit the court to determine preliminary questions of this nature would be to severely limit the fact-finding function of the jury."). Overruling *Ostrem*—and replacing it with a test that requires trial judges to screen facts in every case using a laundry list of eighteen variables—would disrupt

the balance between due process and the role of the jury, transferring power from the jury to "a single employee of the State." *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). Worse, adopting Appellant's test would substitute the truth-searching function of the jury, the fundamental purpose of every criminal trial, with a social science theory that all eyewitness identification is hopelessly unreliable.

It is the jury's duty to confront and assess evidence of questionable credibility during trial. As discussed above, Minnesota laws enhance the jury's ability to fulfill this duty by providing criminal defendants the means to educate the jurors. Implicit in Appellant's position is "a distrust of the ability of jurors to discount the value of an identification obtained through suggestive procedures." *Com. v. Johnson*, 420 Mass. 458, 475–76 (1995) (Nolan, J., dissenting). *Manson* rejected this cynical view and declared that "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." 432 U.S. at 116. Instead of excluding evidence from the jury as Appellant proposes, this Court should "rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill." *Id*.

Diminishing the jury's role as the judge of weight and credibility of evidence—an inevitable consequence of accepting Appellant's position—carries other implications. First, casting doubt on the jury's ability to make credibility determinations raises more evidentiary questions. For example, this Court has been "very reluctant to allow experts to testify about matters that are generally for the jury's determination and are susceptible to cross-examination." *Reese*, 692 N.W.2d at 742 (citation omitted). Specifically, this Court has held that expert opinions concerning a witness's capacity to perceive the world around her "are generally inadmissible because such opinions invade the jury's province to make credibility determinations." *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982). This Court should reject

Appellant's position that the jury cannot competently assess the credibility of eyewitnesses, as it contradicts the rationale behind this Court's precedents that limit what experts may opine in front of the jury.

Second, other legal doctrines that depend on our trust in the jury will also be destabilized. For example, this Court has recently reaffirmed its century-long review standard for convictions based on circumstantial evidence. *See Harris*, 895 N.W.2d at 600. This Court held that "the circumstantial-evidence test protects the principle that the jury is in a unique position to determine credibility of witnesses and weigh the evidence before it" by requiring appellate court to consider only those circumstances that are consistent with the verdict. *Id*. Similar to the *Ostrem* test*,* Minnesota's circumstantial-evidence review standard "appropriately balances our need to defer to the jury's credibility determinations and our duty to ensure that defendants not be convicted based on insufficient evidence." *State v. Hawes*, 801 N.W.2d 659, 670 (Minn. 2011). Therefore, embracing Appellant's view that, even with the help of other safeguards available at trial, the jury cannot competently evaluate the reliability of eyewitness testimony will undermine stability in other legal rules that hinge on our confidence in the jury.

Appellant provides no answers to address these implications. This Court should refuse to rely on social science as the benchmark for the admissibility of eyewitness identification and trust our juries to accord appropriate weight to this evidence at trial.

D. Constitutional law cannot be made on the basis of social science

The Minnesota Supreme Court has declared that "the lodestar of constitutional analysis is the text of the constitution." *Schowalter v. State*, 822 N.W.2d 292, 300 (Minn. 2012). For this reason, this Court has long been developing constitutional law based on our constitutional text, history, or precedent. *See State v. DeLottinville*, 890 N.W.2d 116, 122–23 (Minn. 2017) (declining to adopt a more protective constitutional rule because "nothing in our constitution's

text or history, or in our state's case law or tradition" requires it). Even when a particular decision may create socially desirable outcomes, such policy considerations cannot override the plain text of the constitution. *See State v. Lessley*, 779 N.W.2d 825, 840 (Minn. 2010) (emphasizing that when interpreting the constitution "the question before us is not whether [a particular interpretation] might be wise policy").

Today, Appellant urges this Court to write into the Minnesota Constitution a new protection that has no basis in its text or history, or this Court's precedent. Citing social science on the unreliability of human memory, Appellant argues that *Ostrem* must be overturned because it does not account for a multitude of factors that may influence an eyewitness's recollection. Social science, however, is not a valid basis to decide constitutional issues. *See Missouri v. Jenkins*, 515 U.S. 70, 114, 119–20 (1995) (Thomas, J., concurring). Accepting Appellant's position would create the absurd result where, despite being textually identical, the Minnesota and the federal Due Process Clauses now have different meanings.

Expressing concern over the unique dangers posed by using social science to make constitutional law, Chief Justice Rehnquist cautioned that unlike

> decided cases or statutory language—the sort of material [judges] customarily interpret[,] . . . scientific knowledge, scientific method, scientific validity, and peer review [are] matters far afield from the expertise of judges. . . . [T]he unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 599 (1993) (Rehnquist, C.J., dissenting).

State courts also have criticized the use of social science in deciding constitutional issues. The Wisconsin Supreme Court explained that "social science research cannot be used to define the meaning of a constitutional provision" because "[t]he judiciary is not in a good position to judge social values or social science. . . . It is the legislature that is structured to assess the merits of competing policies and ever-changing social science assertions." *Roberson*, 935 N.W.2d at

820–21; s*ee also State v. Booth-Harris*, 942 N.W.2d 562, 571 (Iowa 2020) (declining to rely on scientific research to alter the test for admissibility of eyewitness identifications under state due process provisions); *State v. Antonio Lujan*, 459 P.3d 992, 999 (Utah 2020) ("[C]ourts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle.").

Just last year, this Court made clear that constitutional law does not change based on what social science theory is in fashion. *See Nelson v. State,* 947 N.W.2d 31 (Minn. 2020), *cert. denied*, 141 S. Ct. 2518 (2021). The United States Supreme Court in *Miller v. Alabama* held that the Eighth and Fourteenth Amendments forbid the imposition of mandatory life imprisonment without parole on offenders who were under the age of eighteen when they committed their crimes. 567 U.S. 460, 470 (2012). The *Miller* Court reasoned that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—in parts of the brain involved in behavior control" and that "those findings . . . lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Id*. at 471–72. (internal quotation marks omitted).

Although social science research has shown that full psychological and neurological maturity is not attained until around the mid-twenties, *see, e.g.*, Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 142 (2016) (citing studies), this Court has declined to extend *Miller* to adult offenders who are cognitively similar to juveniles at the time of their offense. *See Nelson,* 947 N.W.2d at 34 (defendant was 18 years old at the time of the offense). In *Nelson*, this Court explained that a clear line is drawn at eighteen because the comparative immaturity and irresponsibility of juveniles is reflected by the fact that "almost every State prohibits those under

18 years of age from voting, serving on juries, or marrying without parental consent." 947 N.W.2d at 39. This Court emphasized that "absent further guidance from the [United States Supreme Court], [it] will not extend the [*Miller*] rule as a matter of Eighth Amendment law to include adult offenders," and concluded that "the ethical, moral, and public policy-based concerns implicated by the facts of Nelson's case . . . are better left to the Minnesota Legislature." *Id. at 38–39*. Thus, as *Nelson* illustrates, constitutional law cannot be made solely based on social science and policy concerns.

While this Court may be reluctant to admit "the unhappy truth that not every problem was meant to be solved by the Constitution, nor can be," *Herrera v. Collins*, 506 U.S. 390, 428 (1993) (Scalia, J., concurring) (citing Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981)), exercising judicial restraint should not "be confused with an absence of belief or with opposition to progress." *See* Sandra Day O'Connor, *The Majesty of The Law: Reflections of a Supreme Court Justice* 75 (2004).

Overruling *Ostrem* will undermine the stability of this Court's due process jurisprudence. No matter what social science reveals about the fallibility of human memory, *Ostrem* is consistent with both federal and Minnesota due process precedent and there is no principled basis for this Court to depart from *Manson*. Equally important, overruling *Ostrem* will erode our confidence in the jury and tie the development of our constitutional law to ever-evolving social science. In sum, this Court should uphold *Ostrem* and decline to adopt a new test.

***

CONCLUSION

For the foregoing reasons, this Court should uphold *Ostrem* and affirm the judgment of the trial court and the Court of Appeals.

Dated: May 5, 2022

Applicant Details

First Name	**Muhammed**
Middle Initial	**A.**
Last Name	**Uddin**
Citizenship Status	**U. S. Citizen**
Email Address	**mauddin@umich.edu**
Address	**Address** Street **668 Bushwick Ave, Apt 308** City **Brooklyn** State/Territory **New York** Zip **11221** Country **United States**
Contact Phone Number	**9179826200**

Applicant Education

BA/BS From	**City University of New York-Baruch College**
Date of BA/BS	**May 2014**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**August 21, 2020**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Henry M. Campbell Moot Court Competition** **1L Oral Advocacy Competition**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate, Prison Litigation**

Professional Organization

Organizations	**Federal Bar Association** **American Bar Association** **New York State Bar Association** **Just The Beginning Foundation**

Recommenders

Barry, Patrick
barrypj@umich.edu
734-763-2276

Greenberg, Gerald
ggreenberg@gsgpa.com
(305) 728-0953

Smith, David
dbs@davidbsmithpllc.com
703-548-8911

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 04, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a 2020 graduate of the University of Michigan Law School, former law clerk to the Honorable Larry D. Martin of the New York State Supreme Court, Commercial Division, and current law clerk to the Honorable Troy K. Webber of the New York State Supreme Court, Appellate Division, First Department. I write to apply for a clerkship in your chambers for the next available term.

I aspire to a career in litigation and offer a demonstrated commitment to public service. Prior to law school, I worked for four years as Assistant to New York City Comptroller Scott M. Stringer, a role that required strong interpersonal skills and taught me to meet deadlines under extreme time pressure. This served me well in law school, where I argued successfully before an administrative law judge in my first year and co-authored a brief on behalf of a criminal appellant in the United States Court of Appeals for the Sixth Circuit in my third. That would not have been possible, however, without my time at the New York Attorney General's Office, where I honed my legal writing and analysis in the course of writing motions, research memoranda, and interrogatories. These experiences convinced me that a federal clerkship would be the best possible training for my future career as a litigator.

I believe that my passion for writing, coupled with my clerkships at the state level, will allow me to immediately begin contributing to the work of your chambers. I have attached my resume, official law school transcript, two writing samples, and three letters of recommendation for your review. Thank you for your time and consideration.

Respectfully,

M. Anas Uddin

M. ANAS UDDIN

668 Bushwick Ave, Apt 308 • Brooklyn, NY 11221
(917) 982-6200 • mauddin@umich.edu

ADMISSIONS

State of New York (admitted)

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — Class of 2020
Honors: University of Michigan Law School – Dean's Scholar
Activities: 1L Oral Advocacy Competition, *Judge*
Henry M. Campbell Moot Court, *Participant*
Asian Pacific American Law Students Association, *Admissions Liaison*

BARUCH COLLEGE, CITY UNIVERSITY OF NEW YORK — New York, NY
Bachelor of Arts, Economics, Political Science — Class of 2014
Activities: Undergraduate Student Government, *Senator*
THE TICKER (Student Newspaper), *Opinion Editor*
Study Abroad – New York University in London

EXPERIENCE

SUPREME COURT OF THE STATE OF NEW YORK – APPELLATE DIVISION, FIRST DEPARTMENT — New York, NY
Law Clerk to Hon. Troy K. Webber — Mar 2023–Present

- Draft and edit appellate opinions and decisions on motions while adhering to strict deadlines and court rules.
- Write memoranda supplying legal analysis and recommendations advising judge on how to vote in conference.

SUPREME COURT OF THE STATE OF NEW YORK – COMMERCIAL DIVISION, KINGS COUNTY — Brooklyn, NY
Law Clerk to Hon. Larry D. Martin — Aug 2021–Mar 2023

- Drafted decisions in commercial cases with over $150,000 in controversy and in applications involving arbitration.
- Managed docket; held conferences with counsel; and wrote jury instructions and verdict sheets for dozens of trials.

FEDERAL APPELLATE LITIGATION CLINIC — Ann Arbor, MI
Student Attorney – Supervised by Melissa Salinas, Clinical Assistant Professor of Law — Sept–Dec 2019

- Co-authored appellant's opening brief in the United States Court of Appeals for the Sixth Circuit in a case involving constitutional and statutory interpretation issues relating to criminal forfeiture.
- Reviewed the record, conducted legal research, identified appealable issues, and interviewed client in federal prison.

NEW YORK STATE ATTORNEY GENERAL'S OFFICE — New York, NY
Law Intern, Litigation Bureau — June–Aug 2019

- Produced legal research memoranda analyzing federal lawsuits against the State and its employees.
- Drafted interrogatories and deposition questions, and second-chaired deposition of federal corrections officers.

UNEMPLOYMENT INSURANCE CLINIC — Ann Arbor, MI
Student Attorney – Supervised by Steve Gray, Clinical Assistant Professor of Law — May–Aug 2018

- Wrote appeals of Michigan Unemployment Insurance Agency determinations of misconduct, voluntary leaving, and fraud, and successfully argued on behalf of a claimant before a Michigan Administrative Hearing System judge.

NEW YORK CITY COMPTROLLER'S OFFICE — New York, NY
Assistant to the Comptroller, Executive Department — Jan 2014–July 2017

- Traveled with Comptroller and served as primary liaison to N.Y.P.D. counterterrorism detail.
- Delivered speeches at dozens of community events and briefed hundreds of townhalls and legislative sessions.

ADDITIONAL

Certifications: Westlaw – Litigation Research, Westlaw – Advanced Legal Research
University of Michigan (via Coursera) – Writing & Editing (4-Course Specialization)
Interests: Chess, podcasts, soccer, college football

Control No: E180359701 Issue Date: 12/14/2020 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Uddin,Muhammed Anas
Student#: 91524232

Degree Conferred: JD
Date Conferred: August 21, 2020

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2017	**(September 05, 2017 To December 22, 2017)**							
LAW	510	001	Civil Procedure	Len Niehoff	4.00	4.00	4.00	C
LAW	520	002	Contracts	Nicolas Cornell	4.00	4.00	4.00	B
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	C
LAW	593	002	Legal Practice Skills I	Matthew Fogarty	2.00		2.00	S
LAW	598	002	Legal Pract:Writing & Analysis	Matthew Fogarty	1.00		1.00	S
Term Total				**GPA: 2.333**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 2.333**		**12.00**	**15.00**	
Winter 2018	**(January 10, 2018 To May 03, 2018)**							
LAW	530	001	Criminal Law	Sonja Starr	4.00	4.00	4.00	B-
LAW	540	001	Introduction to Constitutional Law	Julian Davis Mortenson	4.00	4.00	4.00	C+
LAW	569	001	Legislation and Regulation	Nicholas Bagley	4.00		4.00	P
LAW	594	002	Legal Practice Skills II	Timothy Pinto	2.00		2.00	S
Term Total				**GPA: 2.500**	**14.00**	**8.00**	**14.00**	
Cumulative Total				**GPA: 2.400**		**20.00**	**29.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Uddin,Muhammed Anas
Student#: 91524232

Degree Conferred: JD
Date Conferred: August 21, 2020

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2018	**(September 04, 2018 To December 21, 2018)**							
LAW	456	001	Government Relations Practicum	Broderick Johnson	3.00	3.00	3.00	B+
LAW	495	001	Negot Entrepreneurial Issues	David Parsigian	2.00	2.00	2.00	B
LAW	601	001	Administrative Law	Nicholas Bagley	3.00	3.00	3.00	B-
LAW	669	002	Evidence	Sherman Clark	3.00	3.00	3.00	B-
LAW	711	001	Law of the Internet	Brian Willen	2.00		2.00	P
LAW	885	007	Mini-Seminar Investigating the President	Sonja Starr	1.00		1.00	S
Term Total				**GPA: 2.918**	**14.00**	**11.00**	**14.00**	
Cumulative Total				**GPA: 2.583**		**31.00**	**43.00**	
Winter 2019	**(January 16, 2019 To May 09, 2019)**							
LAW	654	001	Good with Words: Writing/Edit	Patrick Barry	2.00		2.00	S
LAW	703	001	Legal Issues/Autonomous Veh	Emily Frascaroli	2.00	2.00	2.00	C
LAW	707	001	Mass Media Law	Len Niehoff	3.00	3.00	3.00	C
LAW	869	001	Legal Chall for an Aging Popul	Alison Hirschel	2.00	2.00	2.00	C-
LAW	898	001	Law and Psychiatry Crossroads	Debra Pinals	2.00	2.00	2.00	C
LAW	900	395	Research	Debra Pinals	1.00	1.00	1.00	C
Term Total				**GPA: 1.940**	**12.00**	**10.00**	**12.00**	
Cumulative Total				**GPA: 2.426**		**41.00**	**55.00**	

Continued next page >

Control No: E180359701 Issue Date: 12/14/2020 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Uddin,Muhammed Anas
Student#: 91524232

Degree Conferred: JD
Date Conferred: August 21, 2020

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	408	001	Public Interest Litig Ethics	Paul Reingold	2.00	2.00	2.00	C
LAW	622	001	Editing and Advocacy	Patrick Barry	1.00		1.00	S
			Founding Phrases					
LAW	677	001	Federal Courts	Leah Litman	4.00	4.00	4.00	C+
LAW	900	308	Research	Bridgette Carr	1.00		1.00	S
LAW	972	001	Federal Appel Litig Clnc I	Melissa Salinas	5.00	5.00	5.00	B
Term Total				**GPA: 2.563**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 2.455**	**52.00**		**68.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	738	001	Remedies	Nicolas Cornell	3.00		3.00	PS
LAW	900	393	Research	Patrick Barry	2.00		2.00	PS
LAW	900	155	Research	Howard Bromberg	2.00		2.00	PS
LAW	900	225	Research	Len Niehoff	2.00		2.00	PS
PUBPOL	746	001	Welfare Policy	Luke Shaefer	3.00		3.00	PS
			Social Welfare Policy					
PUBPOL	750	009	Special Topics	Richard Hall	3.00		3.00	PS
			Campaign Finance Reform					
Term Total					**15.00**		**15.00**	
Cumulative Total				**GPA: 2.455**	**52.00**		**83.00**	

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

Control No: E180359701 Issue Date: 12/14/2020 Page 4

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Uddin,Muhammed Anas
Student#: 91524232

Degree Conferred: JD
Date Conferred: August 21, 2020

University Registrar

End of Transcript
Total Number of Pages 4

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
625 South State Street
Ann Arbor, Michigan 48109-1215

Patrick Barry
Clinical Assistant Professor of Law
Director of Digital Academic Initiatives

June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Anas Uddin is a success story. Through an amazing combination of grit, charm, and intellectual humility, he has overcome obstacle after obstacle on his way to developing into an extremely promising young lawyer. I'm confident he'll make an excellent addition to your chambers.

Anas originally sought me out after being disappointed by some of his grades. In charge of Michigan's Peer Tutoring Program, I quickly discovered that these grades were just a fluke. He obviously knew the course material. And he definitely knew how to communicate his ideas with clarity and force. He simply didn't grasp the unique demands of a law school exam.

That's true of many students. What distinguishes Anas, however, is how hard—and how wisely—he worked to improve. He didn't look for quick fixes or shortcuts. He didn't try to solve every issue all at once. Instead, he set up regular meetings with me and came to them with (1) a focused, well-thought out plan to achieve long-term success and (2) the drive necessary to implement it.

The plan didn't always go smoothly, especially when the pandemic hit. But in true Anas fashion, he pivoted and persevered. The resiliency he showed, coupled with his expert performance in the courses he took with me, pushed me to offer him a position on my research team during his 3L year. I figured that his ability to deal with setbacks and adjust to changing circumstances would be a real asset as the team pushed toward an important set of deadlines. I also thought that his multiple years of work experience before law school would bring a helpful, results-focused professionalism to the projects he joined, some of which were staffed by students who had gone straight from college to law school, with no break in between. Happily, I was right on both fronts.

Anas's biggest assignment, for example, involved turning the materials for an in-person course called Good with Words into a four-part online version launched on the educational platform Coursera. He edited the readings. He tested out the exercises. And he made a number of both macro-level and micro-level improvements to everything from the layout to the lectures to the pacing. If you are looking for a clerk who can think in both a big-picture and small-picture way, he's the perfect candidate. He's equally good at high-level strategizing and detail-oriented delivery.

Most of all, though, he is simply a delight to work with. Even now that he's graduated, I regularly correspond with him, often trading book recommendations and writing tips. It's always fun to see his name pop up in my inbox.

For all these reasons and plenty more that I would be happy to share should you decide to give me a call (734.763.2276), I recommend you consider Anas for one of your next clerkship positions. He's bright. He's kind. And he has an impressive track record of adding tremendous value to whatever team he joins.

Thank you for your time.

Sincerely,

/Patrick Barry/

Patrick Barry
Clinical Assistant Professor of Law
Director of Digital Academic Initiatives

Gelber Schachter & Greenberg

Gerald E. Greenberg
Direct: (305) 728-0953
E-mail: ggreenberg@gsgpa.com

One Southeast Third Avenue
Suite 2600
Miami, Florida 33131
Telephone: (305) 728-0950
Facsimile: (305) 728-0951

August 6, 2021

To Whom It May Concern:

I write enthusiastically to recommend Anas Uddin for a judicial clerkship. As I have seen first-hand, Anas possesses the legal skills, practical sense, and personal qualities to make a wonderful addition to any judge's chambers.

Anas and I met in an unusual way. His older brother Asif was a client of mine in a white-collar criminal case in the Southern District of Florida relating to violations of the federal anti-kickback statute. As I represented Asif through his immediate acceptance of responsibility, extensive cooperation with law enforcement, and eventual receipt of a sentence of probation, Anas proved himself to be a valuable member of our "team." He and I spoke frequently about the various legal and factual issues that confronted us in the case, with Anas often serving informally as a "liaison" of sorts between myself and my client's large, loving, and deeply worried family.

Throughout this challenging time, Anas asked probing, insightful questions and provided a valuable sounding board as we discussed his brother's varied options. It was clear to me that he was truly absorbing his law school education and developing the critical thinking skills that allowed him to see both sides of arguments, analyze the relevant authorities, recognize practical considerations, and arrive at the best strategic approach. He and I both commented many times that while nobody should have to endure what he and his family experienced, Asif's case provided Anas with a real-life experience well beyond what one could get in even the most rigorous law school clinic.

While Anas's legal acumen impressed me greatly, I was even more moved by his compassion and commitment to his brother and his family. Despite still being in law school and never having practiced law a day in his life, Anas displayed an understanding of the human element of this profession that is often hard to find even in most seasoned practitioners. He demonstrated a remarkable level of empathy for his brother and his entire family as they navigated the personal, emotional, psychological, spiritual, and reputational aspects of this challenge. At the same time, however, he always demonstrated respect for the prosecution and an understanding of the government's actions and decisions relating to his brother. Anas's ability to balance his deep personal feelings with a clear-eyed appreciation of the law will make him a wonderful attorney and a valuable judicial clerk.

Quite simply, based on my unique experience with Anas Uddin, I wholeheartedly recommend him. If I can provide any additional information, please do not hesitate to contact me.

Thank you very much.

Sincerely,

Gerald E. Greenberg

One Southeast Third Avenue ▪ Suite 2600 ▪ Miami, Florida 33131 ▪ Tel. (305) 728-0950 ▪ www.gsgpa.com

DAVID B. SMITH, PLLC

Nicholas D. Smith
7 East 20th Street, Suite 4R
New York, NY 10003
917.722.1096 / cell 703.822.1086
nds@davidbsmithpllc.com

David B. Smith
108 North Alfred Street, 1st FL
Alexandria, VA 22314
703.548.8911 / fax 703.548.8935
dbs@davidbsmithpllc.com

December 30, 2019

To Whom It May Concern:

It is my privilege to recommend Anas Uddin. I have over 35 years of white-collar criminal experience, as a prosecutor in the Criminal Division of the United States Department of Justice, the United States Attorney's Office for the Eastern District of Virginia, and now as a criminal defense attorney. I have litigated and argued more than one hundred federal criminal appeals and have extensive experience with both civil and criminal litigation in the United States Supreme Court. I have been named among the preeminent lawyers in the field of white-collar criminal defense by Best Lawyers in America (2012-2020) and Virginia Super Lawyers (2009-2019) and thrice received the President's Commendation for outstanding service from the National Association of Criminal Defense Lawyers (1993, 1994, 2004), where I have served as Chair of the Forfeiture Committee since 1990.

I am also the author of the leading two-volume legal treatise on forfeiture law and practice, *Prosecution and Defense of Forfeiture Cases* (LEXISNEXIS 2019). I have testified before congressional committees several times on forfeiture; frequently counseled the Senate and House Judiciary Committees on forfeiture legislation; assisted the federal advisory committees in writing the procedural rules governing criminal and civil forfeiture proceedings; and was heavily involved in drafting the Civil Asset Forfeiture Reform Act of 2000.

Against this backdrop, the brief Anas and his team produced—specifically his Sixth Amendment argument advocating for applying *Apprendi* doctrine to criminal forfeiture—is, I believe, better than 99% of what defense attorneys produce. Throughout the process, he was searching, engaged, and serious. His arguments were equally sophisticated with respect to doctrine and theory, and he was able to connect them persuasively. I am eager to see him argue this case in the Sixth Circuit in a few months.

In getting to know Anas personally, I have found him to be a warm and gregarious young man, who exhibits the qualities of a promising attorney and a valuable colleague. I am confident you will feel the same. If there is anything else you would like to know, please don't hesitate to call or email. I have good things to say.

Sincerely,

David Smith

DAVID B. SMITH

DBS/jaj

M. ANAS UDDIN

668 Bushwick Ave, Apt 308 • Brooklyn, NY 11221
(917) 982-6200 • mauddin@umich.edu

WRITING SAMPLE 1

As a student attorney at Michigan Law's Federal Appellate Litigation Clinic, I drafted this opening brief on behalf of a criminal defendant in the United States Court of Appeals for the Sixth Circuit. While it was a team effort to be sure, I developed and wrote the sections below in their entirety.

Kindly note that, while Rule 32(a)(5)(A) of the Federal Rules of Appellate Procedure requires a typeface that is "14-point or larger," the font here has been reduced to 12-point in size. To preserve confidentiality, certain identifying information has been changed. I have received permission to use this as a writing sample.

STATEMENT OF THE CASE

In March 2015, Matthew Williams was charged with conspiracy to possess and distribute controlled substances in violation of 21 U.S.C. §§ 841(a), 846, and with conspiracy to launder money in violation of 18 U.S.C. § 1956. (R. 3, Indictment, Page ID # 7.) His indictment included forfeiture allegations of certain real property and two lots of currency under 21 U.S.C. § 853(a)(1)-(2), and 18 U.S.C. § 982(a)(1). (*Id.* at Page ID # 11–14.) The prosecution moved to forfeit Mr. Williams's properties and for a $1,000,000 money judgment under 21 U.S.C. § 853(p). (R. 858, Mot. Prelim. Forfeiture, Page ID # 2751–53; R. 861, Mot. Money Judgment, Page ID # 2795–96.)

Mr. Williams pled guilty to both counts but contested all forfeiture allegations. (R. 1027, Plea Hr'g Tr., Page ID # 4021.). He, therefore, excluded them from his guilty plea. (*Id.* 4009–13.) The district court accepted his plea and sentenced him to seventeen years in federal prison. (R. 1006, Judgment, Page ID # 3902.) Following supplementary briefing, the district court granted the prosecution's motions for forfeiture and joint-and-several money judgment. (R. 1005, Forfeiture Order, Page ID # 3895.)

On appeal, Mr. Williams raised challenges to both, arguing that 21 U.S.C. § 853 does not permit joint-and-several money judgments and that the Sixth Amendment bars district courts from imposing a criminal forfeiture without a jury finding or supporting admission. (R. 1125-1, Opening Br., Page ID # 4479, 4495.) This Circuit vacated the court's order remanding for another forfeiture hearing. *United States v. Williams*, 987 F. 3d 779, 784 (6th Cir. 2018). In rejecting the prosecution's argument that the evidence showed Mr. Williams earned $1,000,000 from the conspiracy, this Court noted that the district court "did not make any factual findings about how much money Williams obtained" himself, concluding that "back-of-the-envelope calculations cannot justify [a] million-dollar order without affecting Williams's substantial rights and the fairness of the forfeiture proceeding." *Id.* at 783.

In so holding, this Court directed that the value of the real property and currency seized, "as well as the assets of any co-defendant, [] be subtracted," noting that "[t]hat leaves just as many candidates for lessening Williams's liability as for increasing it." *Williams*, 987 F. 3d at 783. In addition, the panel invited the parties, on remand, to address the constitutionality of criminal forfeiture absent jury findings, calling the question "unanswered . . . in this circuit." *Id.* at 784.

On remand, Mr. Williams argued, again, that the Sixth Amendment bars district courts from finding the statutorily required facts in criminal forfeiture proceedings and that 21 U.S.C. § 853 does not authorize joint-and-several money judgments. (R. 1125, Mot. Dismiss Forfeiture, Page ID # 4438, 4449.) He also requested an evidentiary hearing to address the judgment calculation and forfeitures. (R. 1157, Mot. Recons., Page ID # 4627–28.) The district court held a hearing as to the judgment calculation but denied Mr. Williams's motion to convene a jury as to the latter. (R. 1163, Order, Page ID # 4645–46.) Following that hearing, the district judge granted the money judgment and ordered forfeiture of each of the contested properties. (R. 1203, Forfeiture Order, Page ID # 4956–57.) No other co-conspirator was subject to a money judgment. (R. 1202, Mem., Page ID # 4928 n.3.) The prosecution neither investigated, nor determined, the proceeds obtained by any of Mr. Williams's eighteen co-defendants. (R. 1185, Evid. Hr'g Tr., Page ID # 4766–67.)

Mr. Williams timely filed a notice of appeal. (R. 1208, Notice Appeal, Page ID # 5003.) His case is now again before this Court.

ARGUMENT

I. The District Court's Order is Unconstitutional Under the *Apprendi* Doctrine.

The district court violated the Sixth Amendment by finding the statutorily required facts to forfeit Mr. Williams's properties. As the Supreme Court interpreted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, under the Sixth Amendment, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury," *Ring v. Arizona*, 536 U.S. 584, 585–86 (2004). In applying that principle since *Apprendi*, the Court has "never distinguished one form of punishment from another." *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012).

Criminal forfeiture is a punishment that is contingent on finding certain statutorily required facts. *See* Fed. R. Crim. P. 32.2(b)(1)(A) ("[C]ourt must determine what property is subject to forfeiture under the applicable statute.). Mr. Williams contested those facts, and a jury did not find them. (Plea Hr'g Tr. 4009–13). Instead, the district court found them itself. (Forfeiture Order 4956–57.). But a "judge's authority to issue a [punishment] derives from, and is limited by, the jury's factual findings." *United States v. Haymond*, ___ U.S. ___, 139 S. Ct. 2369, 2376 (2019) (plurality opinion). This Court should, therefore, vacate the order below and hold that judges may not find the required facts in a criminal forfeiture proceeding.

A. Standard of Review

This Circuit reviews questions of constitutional interpretation *de novo*. *Boler v. Earley*, 865 F. 3d 391, 401 (6th Cir. 2017). Mr. Williams preserved the issue below, arguing that the Sixth Amendment prohibits criminal forfeiture supported by judge-found facts. (Mot. Dismiss 4433.)

B. The History of Criminal Forfeiture Confirms a Longstanding Jury Right.

The "scope of the federal constitutional jury right must be informed by the jury's historical common-law role." *Oregon v. Ice*, 555 U.S. 160, 160 (2009). "In the early Republic, if an

indictment or 'accusation . . . lacked any particular fact which the laws made essential to the punishment,' it was treated as 'no accusation' at all." *Haymond*, 139 S. Ct. at 2376 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872). This reflects a longstanding tenet of common-law criminal jurisprudence: that the "truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of . . . his equals and neighbours." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). "[N]o mere procedural formality, but a fundamental reservation of power in our constitutional structure," *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004), "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary," *id.* at 306; *see* Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti–Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department").

Criminal forfeiture is no exception. Eighteenth-century English courts reserved forfeiture adjudications to a jury. 2 David B. Smith, Prosecution & Defense of Forfeiture Cases ¶ 14.03A (2019). At that time, once a jury issued a conviction, courts would "charge the inquest or jury to enquire, what goods and chattels [defendant] hath, and where they are." Matthew Hale, History of the Pleas of the Crown 362 (1778 ed.). An eighteenth-century model jury instruction confirms this: "If they say Guilty, then the clerk asks them, What lands or tenements, goods or chattels, [defendant] had at the time of the felony committed, or any time since?" Thomas Dogherty, The Crown Circuit Companion *15 (1791).

After the Founding, too, once a guilty verdict was rendered, it was juries that determined whether the defendant's property could be forfeited. Brynn Applebaum, Note, *Criminal Asset Forfeiture & the Sixth Amendment After* Southern Union *&* Alleyne*: State-Level Ramifications*, 68 Vand. L. Rev. 549, 563 (2015) (citing *Southern Union*, 567 U.S. at 353–54). But early juries

abhorred forfeiture, seeing it as too harsh a punishment. For example, juries often defied government attempts to raise revenue through forfeiture, "almost invariably report[ing] no lands, tenements, or chattels upon conviction." *Id.* at 566–67 (quoting Julius Goebel Jr. & T. Raymond Naughton, Law Enforcement in Colonial New York 715 (1944)).

Indeed, for nearly *all* of American history, Congress rightly believed in the right to a jury in criminal forfeiture proceedings. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess. 193-94 (1983); H.R. Rep. No. 98-845, 98th Cong., 2d Sess. 18, 38 (1984); former Fed. R. Crim. P. 31(e) (repealed 2000) (required a special verdict in forfeiture prosecutions). Now, when the prosecution seeks forfeiture, defendants may only "request" a jury determination and only in cases "tried before a jury." Fed. R. Crim. P. 32.2(b)(5). In effect, denying it to defendants who plead guilty. And when the prosecution seeks a "money judgment" in lieu of property, the right is foreclosed altogether. *See* Fed. R. Crim. P. 32.2(b)(1)(A) ("If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.").

Thus, after more than 200 years, judges have displaced "the jury's historic role as a bulwark between the State and the accused." *Southern Union*, 567 U.S. at 350 (quoting *Ice*, 555 U.S. at 168). But the "Constitution's guarantees cannot mean less today than they did the day they were adopted." *Haymond*, 139 S. Ct. at 2376. This Circuit should, thus, restore the jury's historic province and hold that judges may not find the required facts in criminal forfeiture proceedings.

C. *Apprendi* Precludes Criminal Forfeiture Supported by Judge-Found Facts.

The district court violated the Sixth Amendment by finding the statutorily required facts in Mr. Williams's criminal forfeiture proceeding. "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'" *Southern Union*, 567 U.S. at 349 (quoting *Ice*, 555 U.S. at 170). This "concern applies" to *any* punishment

"inflicted by the sovereign for the commission of offenses," including criminal forfeiture. *Southern Union*, 567 U.S. at 349

In 2000, the Supreme Court ruled that a New Jersey hate crime statute, which authorized an increase in a defendant's punishment based on a judge's findings, was unconstitutional under the Sixth Amendment. *Apprendi*, 530 U.S. at 494. There, the Court seminally explained that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. From this bedrock, the Court reasoned that the "fact that New Jersey labeled the hate crime a 'sentence enhancement' rather than a separate criminal act was irrelevant for constitutional purposes." *United States v. Booker*, 543 U.S. 220, 231 (2005) (quoting *Apprendi*, 530 U.S. at 478).

In 2002, in *Ring*, 536 U.S. 584, the Supreme Court "reaffirmed [its] conclusion that the characterization of critical facts is constitutionally irrelevant." *Booker*, 543 U.S. 220 at 231 (characterizing its holding in *Ring*). There, following a jury adjudication of a defendant's guilt of first-degree murder, "the trial judge, sitting alone" determined the presence of aggravating factors required by Arizona law for the imposition of the death penalty. *Ring*, 536 U.S. at 588. In reversing, the Court explained that, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—*no matter how the State labels it*—must be found by a jury." *Id.* at 602 (emphasis added). That is, under the Sixth Amendment, a defendant may not providently be "exposed to a penalty exceeding [that which] he would receive if punished according to the facts reflected in the jury verdict *alone*." *Id.* at 602 (quoting *Apprendi*, 530 U.S. at 483) (emphasis added).

Likewise, in 2004, finding that a defendant had acted with "deliberate cruelty," a district judge sentenced the defendant to more than three years above the 53-month statutory maximum. *Blakely*, 542 U.S. at 303. But the "facts supporting that finding were neither admitted by the

[defendant] nor found by a jury." *Ibid.* The Supreme Court reversed, emphasizing that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303–04 (emphasis in original). There, the Supreme Court sent lower courts an admonition: "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id.* at 304 (quoting Bishop, *supra* § 87).

In 2012, a jury convicted a defendant of violating a federal statute, which carried a $50,000 fine for each day of violation. *Southern Union*, 567 U.S. at 347. The jury did not, however, determine the violation's duration. *Id.* at 347. Instead, at sentencing, the district court found that itself—namely, that the violation had lasted for 762 days, equating to a fine of $38.1 million. *Ibid.* On appeal, the defendant argued that imposing more than $50,000 would be unconstitutional under the Sixth Amendment because a one-day penalty is all that the jury's verdict supports. *Ibid.* The Supreme Court agreed, stressing that "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'" *Id.* at 349 (quoting *Ice*, 555 U.S. at 170). There, the Court introspected that, since its decision in *Apprendi*, it has "never distinguished one form of punishment from another." *Id.* at 350.[1]

Here, Congress makes Mr. Williams's authorized punishment statutorily contingent on the finding of facts as to, among other things, the origins and use of his properties. *See* Fed. R. Crim. P. 32.2(b)(1)(A) ("If the government seeks forfeiture of specific property, the court must determine

1 Criminal forfeiture is constitutionally analogous. *Cf. Alexander v. United States*, 509 U.S. 544, 558 (1993) ("Criminal forfeiture . . . is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"). The prosecution recognized as much at *Southern Union*'s oral argument. *See* Tr. of Oral Argument at 37, *Southern Union*, 567 U.S. 343 (2012) (No. 11-94) (U.S. Deputy Solicitor General opining that applying the *Apprendi* doctrine to criminal fines would logically extend to criminal forfeiture).

whether the government has established the requisite nexus between the property and the offense."); 18 U.S.C. § 982(a)(1) (court "shall order" forfeiture of "any property constituting, or derived . . . as the result of [statutory] violation"). Mr. Williams contested the facts supporting forfeiture of his properties and a jury did not find them. (Plea Hr'g Tr. 4009–13.) Instead, the court them itself. (Forfeiture Order 4956–57.) The district judge's practice here was, thus, "exactly what *Apprendi* guards against: judicial factfinding that enlarges the [] punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." *Southern Union*, 567 U.S. at 352. But "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to [his] punishment," *Blakely*, 542 U.S. at 313 (emphasis in original), including Mr. Williams. This Circuit should so affirm.

D. *Apprendi* and its Progeny Supersede Dicta in *Libretti*.

Contrary to the government's arguments, the Supreme Court's statement that there is "no right to a jury verdict on forfeitability" in *Libretti v. United States*, 516 U.S. 29, 49 (1995) is dicta superseded by nearly two decades of precedent. "[E]xpressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Arkansas Game & Fish Commn. v. United States*, 568 U.S. 23, 35 (2012) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257 (1821)). Indeed, no statement "can[] be relied on as a binding authority unless the case called for its expression." *Carroll v. Carroll's Lessee*, 57 U.S. 275, 287 (1853).

And the facts in *Libretti* plainly limit its application. There, the Supreme Court did not need to address the question presented here because—unlike Mr. Williams—the defendant in *Libretti* stipulated, in his plea agreement, the statutorily required facts to support forfeiture of his properties. 516 U.S. at 33–34; *but see* Plea Hr'g Tr. 4009–13, 4021 (Mr. Williams contested all

forfeiture allegations and *excluded* them from his guilty plea). Instead, the Court needed only to address the procedural safeguards required for a defendant to properly waive his right to a jury determination as to forfeiture. *Id.* at 31–32. This is evidenced by the Court's lack of reference to the Sixth Amendment in its questions presented and Justice Souter's concurrence, which notes that the majority's Sixth Amendment analysis was unnecessary to the outcome. *See id.* at 52 (Souter, J., concurring in part and in the judgment) ("I would not reach the question of a Sixth Amendment right to trial by jury on the scope of forfeiture"). Thus, because the facts in *Libretti* did not "call[] for its expression," the statement that there is no constitutional right to a jury verdict on forfeitability is not binding on this Court. *Carroll*, 57 U.S. at 287.

Nor does *Libretti*'s familiar formulation of "forfeiture [a]s an element of the sentence"—as opposed to a "separate substantive offense"—fare any better. 516 U.S. at 29. "[W]e have been down this road." *Haymond*, 139 S. Ct. at 2381. The "characterization of critical facts is constitutionally irrelevant." *Booker*, 543 U.S. at 231. In "*all* criminal prosecutions," the Amendment applies. U.S. Const. amend. VI (emphasis added). Indeed, the Supreme Court has "repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution." *Haymond*, 139 S. Ct. at 2379. And "repeatedly explained [that] any increase in a defendant's [] punishment contingent on the finding of a fact requires a jury . . . no matter what the government chooses to call the exercise." *Ibid.* (quoting *Ring*, 536 U.S. at 602).

It has applied this foundational principle to mandatory federal sentencing guidelines in *Booker*, 543 U.S. 220; the death penalty in *Ring*, 536 U.S. 584; mandatory state sentencing guidelines in *Blakely*, 542 U.S. 296; criminal fines in *Southern Union*, 567 U.S. 343; and mandatory minimum sentences in *Alleyne v. United States*, 570 U.S. 99, 117 (2013). In fact, "in the years since *Apprendi*," the Supreme Court "has not hesitated to strike down [governmental]

innovations that fail to respect the jury's supervisory function." *Haymond*, 139 S. Ct. at 2377. This Circuit should not either.

M. ANAS UDDIN

668 Bushwick Ave, Apt 308 • Brooklyn, NY 11221
(917) 982-6200 • mauddin@umich.edu

WRITING SAMPLE 2

I wrote this proposed opinion as a judicial law clerk to Honorable Larry D. Martin, of New York State Supreme Court, Kings County, who presides over its Commercial Division. It is my work alone, wholly unedited by others. The fully edited decision and order was rendered early last year. To preserve confidentiality, certain identifying information has been changed. Judge Martin gave me permission to use this as a writing sample.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, COMMERCIAL DIVISION

WYCKOFF HEIGHTS MEDICAL CENTER,

No. [redacted]

Plaintiff,

- against -

DECISION & ORDER
Motion Sequence No. 5

LAURENCE BATMAZIAN and MLMIC INSURANCE COMPANY,

Defendants.

Medical Liability Mutual Insurance Company ("MLMIC"), now called MLMIC Insurance Company, supplies professional liability insurance to health care providers in New York. In 2018, MLMIC demutualized—converted from a mutual insurance company to a stock insurance company—the first in the State to do so. Plaintiff Wyckoff Heights Medical Center ("Wyckoff") is a hospital that serves predominantly Brooklyn and Queens. Wyckoff employed Defendant Laurence Batmazian ("Dr. Batmazian") as a surgeon from 2014 to 2017. This Court is asked to determine whether certain monies ("Proceeds") paid as part of the demutualization providently belongs to Dr. Batmazian, the employee-holder of a MLMIC policy, or to Wyckoff, the employer that administered and paid the premiums on her policy.[1] While the four Departments of the Appellate Division are split on this question, the Second Department is not. Only the policyholder, Dr. Batmazian, is entitled to the Proceeds.

I.

A.

Upon hire, pursuant to their employment contract ("Employment Contract"), Wyckoff procured medical malpractice insurance for Dr. Batmazian from MLMIC ("Policy"). Specifically, the Employment Contract, Section 6 required that Wyckoff "maintain policies of professional liability insurance . . . to insure [Dr. Batmazian]." That is, Wyckoff, rather than Dr. Batmazian, was obligated to pay the premiums on her Policy. To effectuate Wyckoff's contractual obligation and in the ordinary course, Dr. Batmazian designated Wyckoff as "Policy Administrator"

1 *See* Premium, *Black's Law Dictionary* (11th ed 2019) ("The amount paid at designated intervals for insurance; esp., the periodic payment required to keep an insurance policy in effect.")

("Administrator Agreement"). According to the Administrator Agreement's terms, "Designation as a Policy Administrator confers no coverage." Rather, a "Policy Administrator is the agent" of the insured "for the paying of Premium, requesting changes in the policy, including cancellation thereof and for receiving dividends and any return Premiums when due."

Separately, the Employment Contract, Schedule A ("Compensation Section") details the compensation and benefits to which Dr. Batmazian was entitled as a Wyckoff employee. Namely, the Compensation Section states that the "compensation and benefits as expressly provided in [] Schedule A shall be the sole and exclusive compensation and benefits" to be provided to Dr. Batmazian "in consideration for all of the services rendered or to be rendered by [Dr. Batmazian] and all of [her] obligations" under the Employment Contract. It provides, for example, that she was entitled to $350,000 per contract year, as well as health, dental, and life insurance.

B.

MLMIC, like "[e]very domestic mutual insurance corporation," was "organized, maintained[,] and operated for the benefit of its members" and "[e]very policyholder [was] a member" (Insurance Law § 1211[a]). Thus, when MLMIC issued the Policy, Dr. Batmazian acquired both "membership interests (*e.g.*, the right to elect directors and the right to receive a proportionate share of the company if it liquidates) and contract rights (*i.e.*, the obligations of the insurance company under the policy)" (*Maple Medical, LLP v. Scott*, 191 AD3d 81, 84 [2d Dept 2020], quoting *Bank of N.Y. v. Janowick*, 470 F3d 264, 267 [6th Cir 2006]).

In 2016, National Indemnity Company, a member of the Berkshire Hathaway Group, sought to buy MLMIC in exchange for $2.502 billion in "Cash Consideration." As statutorily required, pursuant to its Board of Directors' resolution, MLMIC applied to the Superintendent of the New York State Department of Financial Services ("DFS") for permission to demutualize (s*ee* Insurance Law § 7307[b] ["domestic mutual insurer may apply to the superintendent for permission to convert into a domestic stock property/casualty insurer . . . pursuant to a resolution, adopted by no less than a majority of the entire board of directors"]). By law, once such permission is obtained, the parties to the proposed transaction must prepare a conversion plan that must also be approved by DFS (*see* Insurance Law § 7307[d]-[e] ["superintendent may grant or deny permission to the board of directors to submit to him a plan of conversion. If permission is granted, . . . [a] copy of the plan . . . shall be submitted to the superintendent"]).

In June 2018, MLMIC submitted its plan of conversion ("Plan") to DFS. The Plan provided that the Cash Consideration would be distributed *pro rata* to "Eligible Policyholders,"

which it defined — consistent with Insurance Law § 7307(e)(3) — as "each person who had a policy in effect during the three-year period preceding the MLMIC Board's adoption of the resolution" or "their Designees." [2] The Plan identified the person with a policy "in effect" as whoever is "named as Insured" on the contested policy. But causing confusion around the State, the Plan defined designees as "Policy Administrators . . . to the extent designated by Eligible Policyholders to receive the portion of Cash Consideration allocated to such Eligible Policyholders." That is, under the Plan, each policyholder would be entitled to a share of the Cash Consideration—Proceeds—to buy out her MLMIC membership interest *unless* she designated her "Policy Administrator" to receive the Proceeds in her stead.

In September 2018, DFS approved both MLMIC's demutualization and NICO's acquisition. In its approval ("DFS Approval"), DFS noted that, at its public hearing on the matter, some employers "contend[ed] that the [Proceeds] should be paid to them in the circumstances where they paid the premiums on behalf of policyholders and/or acted as policy administrators." In particular, one commenter "referred to the provision of Insurance Law § 7307(e) stating that in calculating such person's equitable share one must factor in the amount 'such policyholder has . . . paid to the insurer,'" and "suggested that this means that the person that paid the premium is automatically entitled" to the Proceeds. Notably, DFS rejected that interpretation reasoning that, as it relates to mutual insurance companies, "[m]embership interests . . . exist only in connection with a policyholder's ownership of a policy" and observed that "Insurance Law § 7307(e)(3) expressly defines those persons who are entitled to receive the [P]roceeds . . . as each person who had a policy 'in effect during the three-year period' preceding the MLMIC Board's adoption of the resolution."

But DFS recognized that policyholders may have assigned their rights to others, so the Plan included an objection and escrow procedure for contested Proceeds. Under that procedure, a policy administrator could object to the Proceeds' distribution to the named insured if the policy administrator believed itself, rather than the policyholder, entitled to the same. Upon proper objection, the Proceeds would be held in escrow pending the parties' agreement or the outcome of

2 *See* Insurance Law § 7307(e)(3) ("[E]ach person who had a policy of insurance in effect at any time during the three-year period immediately preceding the date of adoption of the resolution shall be entitled to receive in exchange for such equitable share, without additional payment consideration payable in voting common shares of the insurer or other consideration, or both.").

an adversarial proceeding. MLMIC and NICO closed both the demutualization and acquisition in October 2018.

II.

Duly lodging its objection with MLMIC, in December 2018, Wyckoff filed this action alleging breach of the Employment Contract and seeking a declaratory judgment that Dr. Batmazian would be unjustly enriched if she were awarded the Proceeds. As to the former, Wyckoff asserted that, because its obligation to maintain Dr. Batmazian's Policy was not set forth in the Compensation Section, which supplies her "sole and exclusive compensation and benefits," Dr. Batmazian is not entitled to the Proceeds, a function of the Policy. As to the latter, Wyckoff charged that, notwithstanding that Dr. Batmazian is the named insured on her Policy, Wyckoff is the *de facto* policyholder because it paid its premiums and controlled its every aspect.

In February 2019, by orders to show cause, Dr. Batmazian and Wyckoff moved to compel the Proceeds' release to them (Mot. Seq. Nos. 1, 2). In May 2019, this Court denied both ("Decision 1"). In August 2020, Dr. Batmazian moved to dismiss the complaint and for an order to compel the Proceeds' release to her (Mot. Seq. No. 3). Although declining to do so, in January 2021, this Court dismissed Wyckoff's unjust enrichment claim on the grounds that, "as an equitable matter, neither party can be said to be unjustly enriched by receipt of the Proceeds" but let stand Wyckoff's contractual claim in gathering that "issues of facts exist" that discovery may resolve ("Decision 2").

In August 2021, Dr. Batmazian moved for summary judgment as to Wyckoff's breach of contract claim and leave to reargue Decision 1 and, again, for an order to compel the Proceeds' release to her (Mot. Seq. No. 4). In December 2021, this Court granted Dr. Batmazian leave to reargue Decision 1 and, upon reconsideration, dismissed Wyckoff's breach of contract claim reasoning that the Proceeds are a "windfall," which, "as a matter of fundamental contract law, could not have been bargained for and, thus, cannot fall under the Employment Contract's ambit" ("Decision 3"). But this Court once again denied Dr. Batmazian's request to direct the Proceeds' release in ruling that, "while Dr. Batmazian has demonstrated that no cause of action should lie against her for breach of contract and unjust enrichment, neither party has demonstrated, thus far, that it should be deemed the owner of the Proceeds."

Dr. Batmazian now moves for leave to reargue Decision 3 (Mot. Seq. No. 5). In so moving, she charges that, as a matter of law and equity alike, this Court has repeatedly, erroneously declined to compel the Proceeds' release to her. She is correct.

III.

A.

Motions for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). While it "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented," (*Anthony J. Carter, DDS, P.C. v. Carter*, 81 AD3d 819, 820 [2d Dept 2011], quoting *McGill v. Goldman*, 261 AD2d 593, 594 [2d Dept 1999]), the motion "is addressed to the sound discretion" of this Court (*Kugler v. Kugler*, 174 AD3d 876, 877 [2d Dept 2019], quoting *C. Mortg. Co. v. McClelland*, 119 AD3d 885, 886 [2d Dept 2014]),

B.

Following MLMIC's demutualization, health care employers and employees across the State have litigated the issue of who is entitled to the Proceeds, and the Appellate Division is split on the question. In 2019, the First Department held for the employer (*Schaffer, Schonholz & Drossman, LLP v. Title*, 171 AD3d 465 [1st Dept 2019]). The following year, the Fourth (*Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 182 AD3d 984 [4th Dept 2020]), Third (*Schoch v. Lake Champlain Ob-Gyn, P.C.*, 184 AD3d 338 [3d Dept 2020]), and Second (*Maple Medical*, 191 AD3d 81) Departments found for the employees. Many more cases have followed. As a result, the Court of Appeals has agreed to hear eight of them (*see, e.g., Columbia Mem'l Hosp. v. Hinds*, 188 AD3d 1337 [3d Dept 2020], *lv to appeal granted*, 36 NY3d 904 [2021]). Nonetheless, this Court must apply the law as it stands today (*seee Maple Medical*, 191 AD3d at 90 ["Supreme Court is bound to apply the law as promulgated by the Appellate Division in its own Department . . . until its home Department or the Court of Appeals pronounces a contrary rule"].

In *Schaffer*, 171 AD3d 465, an expedited proceeding submitted directly to the Appellate Division, First Department as a court of first impression on stipulated facts under CPLR 3222, an employee-health care provider argued that, under the Plan, she is entitled to the Proceeds because she was sole MLMIC policyholder and did not designate her employer to receive the same. The First Department, in a brief opinion, held that awarding the Proceeds to the employee "would result in her unjust enrichment" since she did not "bargain for the[ir] benefit" (*id.* at 465). However, the employee in that case did not raise arguments under Insurance Law § 7307.

In *Maple-Gate*, 182 AD3d 984, an anesthesiology practice sued its former employees for conversion and unjust enrichment. Like Dr. Batmazian, only the employees were named as the insured on their MLMIC policies. Similarly, all the employees designated their employer, Maple-Gate, as "Policy Administrator," which gave Maple-Gate the right to receive dividends and return premiums and otherwise manage its employees' policies. However, unlike Wyckoff, Maple-Gate agreed to pay its employees' premiums as part of their compensation packages. Supreme Court, Erie County granted the employees' motion to dismiss, and the Fourth Department affirmed. In doing so, the unanimous panel pointed to Insurance Law § 7307(e)(3) and the Plan in interpreting that "each person who had a policy of insurance in effect" is entitled to the Proceeds unless he or she "*affirmatively* designated a Policy Administrator . . . to receive [the Proceeds] on his or her behalf" (*id.* at 985 [emphasis added]).

In *Lake Champlain*, 184 AD3d 338, a nurse midwife and obstetrics/gynecology nurse practitioner sued her employer seeking a declaratory judgment as to her entitlement to the Proceeds, and her employer counterclaimed unjust enrichment. There, too, under the parties' employment agreement, the employer, Lake Champlain, was required to pay the premium on its employee's MLMIC policy, which named only the employee as the insured. She, like Dr. Batmazian, designated her employer as "Policy Administrator," thereby appointing Lake Champlain as her agent and giving it the right to make changes to her policy and receive dividends. Supreme Court, Saratoga County, like the First Department, granted summary judgment to Lake Champlain on the grounds that the employee would otherwise be unjustly enriched.

The Third Department reversed, holding that, under Insurance Law § 7307(e)(3), the Proceeds are owed to those who had a "policy of insurance in effect" during the relevant period or, under the Plan, their "designees"— that is, "someone [that] a policyholder *specifically* designated to receive the [P]roceeds" (*Lake Champlain*, 184 AD3d at 342 [emphasis added]). There, the court reasoned that, although the Plan "gives a policy administrator the right to object if it believes that it has a legal right to the [Proceeds], the right to object carries no rights, in and of itself, and the objector must prove its claimed legal right thereto" (*id.* at 342). In other words, "an ordinary designation as policy administrator does not convey the right to receive" the Proceeds" (*ibid.*).

Later that year, this Department "addressed the same single legal issue at the heart of all of the actions"—whether the Proceeds rightfully belong to the employee-policyholder or the employer that paid the premiums on, and administered, the employee's policy (*Maple Medical*,

191 AD3d at 88). There, the employer, Maple Medical, sued its employee for unjust enrichment and sought declaratory judgment as to its entitlement to the Proceeds. Since, at the time, there was only one appellate decision on point—that of the Appellate Division, First Department, in *Schaffer*, 171 AD3d 465—Supreme Court, Westchester County believed itself bound by *stare decisis* to apply *Schaffer*'s precedent in the absence of a contrary ruling from the Second Department or the Court of Appeals. Thus, Westchester County denied the employee's motion for summary judgment, granted Maple Medical's, and declared Maple Medical entitled to the Proceeds.

In reversing and delineating the proper *stare decisis* standard, the Second Department held that the "plain language of Insurance Law § 7307, the plan of conversion, and the DFS [Approval] make clear that the policyholder is entitled to the [Proceeds]" (*Maple Medical*, 191 AD3d at 92). There, the Court also rejected Maple Medical's unjust enrichment claim, reasoning that "payment of the medical malpractice insurance premiums was not a gratuitous act; it was part of the bargained-for consideration for the employment services that the physicians provided to the medical group" (*id.* at 103–104). In doing so, this Department made clear where it stands: "We agree with our colleagues in the Third and Fourth Departments that the [Proceeds] belong to the physician-policyholder and respectfully do not agree with our colleagues in the First Department that the [Proceeds] should be paid over to the medical practice-employer" (*id.* at 83).

Here, the Proceeds in controversy are $179,402.64. The parties do not dispute that Dr. Batmazian is the sole named insured on her Policy. Under the Plan, in accord with Insurance Law § 7307, for an entity other than the policyholder to be entitled to the Proceeds, the policyholder needed to designate that entity to receive it. The dispositive question is, thus, whether Dr. Batmazian designated Wyckoff to receive the Proceeds in her stead. Neither the Employment Contract's nor the Administrator Agreement's terms indicate that she did. When twice asked by Wyckoff to specifically or affirmatively designate Wyckoff to receive the Proceeds, she declined to do so. Her merely designating Wyckoff as her agent does not make it a policyholder, does not make Wyckoff a member of MLMIC, and does not entitle Wyckoff to the Proceeds. Thus, Dr. Batmazian remains entitled to the same.

Wyckoff resists this conclusion arguing that the facts here are distinguishable from those in *Maple Medical* since, there, payment of the employees' premiums was part of their compensation. The argument goes that, because the Compensation Section supplies Dr. Batmazian's "sole" and "exclusive" compensation and omits therefrom payment of the premiums, she is not entitled to the Proceeds, a product of the Policy. But "[m]embership interests in a mutual

insurance company are not paid for by the premiums; rather, such rights are acquired, at no cost, as an incident of the structure of the mutual insurance policy, through operation of law and the company's charter and bylaws" (*Maple Medical*, 191 AD3d at 82). That is, Wyckoff "has not provided the benefits in question" (*id.* at 83). It, therefore, cannot be said that Wyckoff's obligation to maintain Dr. Batmazian's Policy pursuant to a different section than that of Compensation, somehow, entitles it to the Proceeds because the Proceeds are simply *not* compensation. Instead, the Proceeds are a mere function of Dr. Batmazian's membership in MLMIC, which, in turn, "exist[s] only in connection with [her] ownership of a policy" (DFS Approval).

At bottom, like the Third and Fourth Departments, and in accord with the Second, this Court sees "no distinction . . . between a policyholder who pays the premium out of his (or her) own pocket versus a policyholder whose employer pays the premium as part of an employee compensation package. Insurance Law § 7307 does not confer an ownership interest to anyone other than the policyholder" (*Lake Champlain*, 184 AD3d at 343, quoting *Maple-Gate*, 63 Misc 3d 703, 709 [Sup Ct, Erie Cnty 2019], *aff'd*, 182 AD3d 984 [4th Dept 2020]).

IV.

Accordingly, it is hereby

ORDERED, that Dr. Batmazian's motion for reargument is **GRANTED** and, upon reconsideration, Dr. Batmazian's motion for summary judgment dismissing Wyckoff's claim for declaratory judgment is **GRANTED**. MLMIC is directed to release to Dr. Batmazian the Proceeds in the principal amount of $179,402.64 within 30 days of service of this decision & order with notice of entry.

Dated:

_____

Hon. Larry D. Martin
Supreme Court of the State of New York

Applicant Details

First Name	**Sruthi**
Last Name	**Venkatachalam**
Citizenship Status	**U. S. Citizen**
Email Address	**sruthi.venkatachalam@yale.edu**
Address	**Address** **Street** **4580 Royal Birkdale Dr** **City** **Westerville** **State/Territory** **Ohio** **Zip** **43082**
Contact Phone Number	**7409728284**

Applicant Education

BA/BS From	**Case Western Reserve University**
Date of BA/BS	**May 2020**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 31, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Yale Law and Policy Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Morris Tyler Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hathaway, Oona
oona.hathaway@yale.edu
203-436-8969

Kronman, Anthony
anthony.kronman@yale.edu
203-432-4934

Siegel, Reva
reva.siegel@yale.edu
203-432-6791

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sruthi Venkatachalam
93 Mansfield St. Apt. 2
New Haven, CT 06511
sruthi.venkatachalam@yale.edu
740-972-8284

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto:

I graduated from Yale Law School in 2023, and I wish to apply for a clerkship in your chambers for the 2025-2026 term or any term thereafter. During the 2023-2024 year, I will be working in the Washington, D.C. office of Skadden, Arps, Slate, Meagher & Flom LLP in the National Security Practice Group.

I am interested to clerk in your chambers given your background working as an Assistant U.S. Attorney. As a lawyer with aspirations to work in a U.S. Attorney's Office focusing on national security litigation, I would welcome the opportunity to work with a judge whose experience aligns with my professional interests.

I have enclosed a resume, law transcript, undergraduate transcript, writing sample, and list of recommenders. Professors Oona Hathaway, Anthony Kronman, and Reva Siegel have submitted letters of recommendation on my behalf. I am happy to provide any additional information you might require. Thank you for your consideration.

Sincerely,

Sruthi Venkatachalam
Enclosures

SRUTHI VENKATACHALAM
sruthi.venkatachalam@yale.edu | 740-972-8284 | she/her/hers
127 Wall St., New Haven, CT, 06511

EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D., expected May 2023
Activities: Yale Law and Policy Review, *Executive Development Editor*
Just Security, *Student Staff Editor*
National Security Group (NSG), *VP of Scholarship*

CASE WESTERN RESERVE UNIVERSITY (CWRU), Cleveland, OH
M.A., Military Ethics, May 2020
Honors: CALI Award in International Law (Highest grade in International Law Fall 2019 at CWRU Law School)
Thesis: Torture as Mala in Se and Rapport Based Interrogations as a Superior Model

B.A., Statistics and B.A., International Studies, May 2020, *summa cum laude*
Honors: Phi Beta Kappa, Webster Godman Simon Award for Excellence in Mathematics (awarded to one BA candidate annually), Dean's High Honor List

EXPERIENCE

COKER FELLOW IN CONSTITUTIONAL LAW Fall 2022
Fellow for Professor Kronman. Instructed a group of first year students on the fundamentals of legal writing and critiqued their briefs by providing substantial feedback on interpretations of case law and effective legal advocacy. Mentored first year students by advising them on navigating law school and developed group camaraderie.

SKADDEN, ARPS, SLATE, MEAGHER, & FLOM Summer 2022
Washington DC Office Summer Associate. Drafted memoranda in support of the national security and litigation practice groups on issues relating to the Eighth and Fourteenth Amendments, consumer financial protection, and AI technology. Analyzed case law and conducted statutory analysis related to FCRA and federal preemption of New York state laws.

MEDIA FREEDOM AND INFORMATION ACCESS CLINIC Fall 2021 – Fall 2022
Student Clinician. Advocated for algorithmic accountability in the Connecticut state legislature and testified to the Connecticut Advisory Board for the U.S. Commission on Civil Rights on the intersection between algorithms and civil liberties. Litigated First Amendment issues in state and federal court for FOIA and defamation suits.

JUDGE VICTOR A. BOLDEN, U.S. DISTRICT COURT, DISTRICT OF CONNECTICUT Spring 2022
Legal Extern. Assisted chambers in the preparation of judicial orders and opinions by conducting legal research, writing legal memoranda, and drafting sections of orders for a range of civil and criminal cases on the judge's docket.

PROFESSOR REVA SIEGEL, YALE LAW SCHOOL Winter 2021 – Spring 2022
Research Assistant. Conducted extensive research and wrote memoranda on constitutional law issues relating to reason-based bans for abortions, suspect classification based on wealth in the Warren Court, and the emergence of originalism.

U.S. DEPARTMENT OF JUSTICE, PUBLIC INTEGRITY SECTION Summer 2021
Summer Intern. Researched and drafted memoranda on novel legal issues such as those arising from emerging technologies, civil procedure, evidentiary question, statutes of limitations, and the effects of recent U.S. Supreme Court developments, drafted prosecution memoranda, and drafted motions for ongoing litigation.

FEDERAL BUREAU OF INVESTIGATION May 2018 – March 2020
D.C. Headquarters Honors Intern; Cleveland Field Office Honors Intern. Provided tactical support, program management, and analytical insights for cases in FBI's Counterterrorism Division and High Value Detainee Interrogation Group.

SKILLS AND INTERESTS

Muay Thai, Brazilian Jiu Jitsu, Classical Violin, Baking, Statistical Analysis, R and R Studio, STATA, MATLAB

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 02

Record of: Sruthi Priyal Venkatachalam Page: 1
Issued To: Sruthi Venkatachalam
Parchment Document ID: TWB2OSBK

Date Entered: Fall 2020

Degree Awarded : Juris Doctor 31-MAY-2023

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2020					
LAW	10001	Constitutional Law I Section B	4.00	CR	R. Siegel
LAW	11001	Contracts I Section A	4.00	CR	S. Carter
LAW	12001	Procedure I Section A	4.00	CR	H. Koh
LAW	14001	Criminal Law & Admin I Grp 3	4.00	CR	J. Whitman
		Term Units 16.00 Cum Units 16.00			
Spring 2021					
LAW	21024	Cyberlaw, Policy, and Politics	1.00	CR	O. Hathaway
LAW	21277	Evidence	4.00	H	S. Carter
LAW	21722	StatutoryInterpretRegState	3.00	P	W. Eskridge
LAW	30246	Policing, Law,andPolicy Clinic	3.00	H	T. Meares, T. Tyler, J. Camacho
LAW	40001	Supervised Research	1.00	H	P. Gewirtz
LAW	50100	RdgGrp:Law and Ethics Big Data	1.00	CR	J. Balkin
		Term Units 13.00 Cum Units 29.00			
Sup. Research: Just Security Writing Fellowship.					
Fall 2021					
LAW	20011	Sentencing	3.00	P	J. Gleeson
LAW	20170	Administrative Law	4.00	H	C. Jolls
LAW	20219	Business Organizations	4.00	H	J. Macey
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, D. Dinielli, S. Baron, N. Guggenberger, J. Borg, J. Balkin, S. Stich
		Term Units 15.00 Cum Units 44.00			
Spring 2022					
LAW	21068	Antitrust	4.00	H	G. Priest
Supervised Analytic Writing					
LAW	21763	International Law	4.00	H	O. Hathaway
LAW	21784	Intelligence Law	2.00	H	O. Hathaway, R. Litt
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, S. Shapiro, D. Dinielli, S. Baron, N. Guggenberger, J. Borg, J. Balkin, S. Stich
LAW	40001	Supervised Research	2.00	CR	C. Jolls
Substantial Paper					
		Term Units 16.00 Cum Units 60.00			
Fall 2022					
LAW	20366	Federal Courts	3.00	H	A. Steinman
LAW	20557	Torts and Regulation	3.00	H	D. Kysar
LAW	30212	International Arbitration	2.00	H	M. Friedman
LAW	30218	Advanced Written Advocacy	3.00	H	N. Messing
LAW	50100	RdgGrp:Repro Justice Lawyering	1.00	CR	A. Miller
		Term Units 12.00 Cum Units 72.00			

********** CONTINUED ON PAGE 2 **********

Official transcript only if Registrar's Signature, Embossed University Seal and Date are affixed

YALE LAW SCHOOL
Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY
Date Issued: 02-JUN-2023

Record of: Sruthi Priyal Venkatachalam — Page: 2
Level: Professional: Law (JD)

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Institution Information continued:					
Spring 2023					
LAW	21017	Property	4.00	H	T. Zhang
LAW	21217	Crim Procedure: Adjudication	3.00	P	P. Shechtman
LAW	21258	ComparativeCrimLawFairTrials	2.00	H	R. Coffey
LAW	30193	ProsecutnExtrnshp&Instruction	3.00	H	K. Stith, M. Donovan, J. Francis, H. Cherry, S. Garbarsky

Term Units 12.00 Cum Units 84.00

********************** END OF TRANSCRIPT **********************

HEATHER ABBOTT, REGISTRAR

Official transcript only if registrar's signature, embossed university seal and date are affixed

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

May 15, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to highly recommend Sruthi Venkatachalam for a clerkship in your chambers.

Sruthi grew up in the Columbus, OH area, the daughter of Indian immigrants. She attended Case Western Reserve University, where excelled, earning a BA in Statistics and International Studies summa cum laude and an MA in Military Ethics. She came to Yale Law School after working for nearly two years at the FBI.

I got to know Sruthi as a student in two classes—International Law and Intelligence Law, both of which she took in Spring 2022. In International Law, a large course, Sruthi was a regular participant in class, and she wrote a very strong exam, for which she received an H. In Intelligence Law, a seminar that I co-taught with Bob Litt, former General Counsel at the Office of the Director of National Intelligence, Sruthi wrote two essays. The first evaluates the current case law on the use of the official acknowledgement doctrine to rebut the Glomar response (a response to a request for information that will "neither confirm nor deny" the existence of the information) and argues that a broader, more expansive reading of the doctrine is more in line with the purpose of the doctrine and with the Freedom of Information Act. The second paper examines the Augmenting Intelligence using Machines strategy being deployed to incorporate artificial intelligence into the intelligence community. It explores the transparency issue in artificial intelligence and the dilemma it poses for the intelligence community, and it proposes integrating mandatory impact assessments into the existing oversight regime to help overcome this challenge. Both essays were extremely well researched and very well written, and she again received an H for the course. (On the second, Bob wrote that he learned from it—which is high praise, as he is as informed in this area as anyone in the country.) The writing skill she demonstrated in the class gives me confidence that Sruthi would be an excellent law clerk. This is further reinforced by her work at Just Security, where she has been a senior student editor—a very competitive position given only to students who demonstrate excellent writing and editing skills.

After clerking, Sruthi is interested in pursuing a career in public service. As I mentioned at the outset, she worked for almost two years at the FBI. In her summers during law school, she gained further experience as an intern at the Department of Justice in the Public Integrity Section and as a Summer Associate at Skadden Arps. She has also worked as an extern for Judge Victor Bolden, which has given her valuable insight into legal practice. These experiences have prepared her to be an excellent law clerk.

For these reasons, I highly recommend Sruthi for a position as a law clerk. If you have any questions, please contact me at oona.hathaway@yale.edu, or by phone at 203-436-8969 or via my cell at 203-343-8482.

Sincerely,

Oona A. Hathaway
Gerard C. and Bernice Latrobe Smith Professor of International Law

May 16, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to you on behalf of Sruthi Venkatachalam, a third-year student at the Yale Law School. Sruthi will graduate this spring, after a most distinguished career at the Law School. She has applied for a clerkship in your chambers. Sruthi has my enthusiastic support.

Last fall, Sruthi was one of two Coker Fellows assisting me in teaching my class in constitutional law. Constitutional law is one of four courses that first-term students at Yale are all required to take. My class was what we call a “small group”—a seminar-sized class of sixteen. Each first-term student takes one of his or her required classes in a small-group format. The idea is to allow for more conversational interaction and to give students the opportunity to develop a closer relation with one of their professors. Those teaching small groups are allowed to choose two third-year students to assist them. I had more than sixty applicants for my two Coker positions. Sruthi was one of the two I chose. I was thrilled that I did.

Over the course of the term, and then after, Sruthi and I met often to discuss matters pertaining to the small group. Sometimes the issues were procedural or even personal. When should we schedule a make-up class? What is the best day to plan an outing to Block Island, where I live in the summer and fall? How is this or that particular student doing? Are there any reasons to be concerned?

Sometimes the issues were substantive. What is the best way of introducing students to the ins and outs of the Commerce Clause, and how can the cases from Gibbons to Sibelius be most effectively used as a window into (some of) the complexities of American federalism? Which of the many school desegregation cases that followed Brown are the best ones to illustrate the dimensions of the problem and the Supreme Court’s shifting perspective(s) on it?
On the personal side, Sruthi was unfailingly wise and kind. She knew what our students needed and how best to help them. It is not an exaggeration to say that by the end of the term, they all loved her. She was always available; always understanding; always clear in her directions and advice. My first-term students could not have had a better third-year friend.

On the substantive side, my many, many conversations with Sruthi were invariably stimulating and helpful to me. Sruthi has a first-rate mind. She thinks with uncommon clarity and range. When I spoke with her about the cases on our syllabus, she always had a sure grasp of their details, down to the molecular level, and a highly intelligent, often imaginative, understanding of their implications. I do not have a shadow of a doubt that Sruthi could have taught the course herself. I would have enjoyed being her student.

Toward the end of the term, the students were required to brief and argue a case then before the Supreme Court (303 Creative v. Eleni). Sruthi and her co-Coker chose the case; worked intensively with each student in the class on his or her brief; and joined me on the bench for the oral arguments in the final week of the semester.

The briefs were uniformly excellent. In part, this was the result of the effort and intelligence the students themselves put into their work. But I know to a certainty that the briefs would not have been nearly as good, or the arguments as forceful, if Sruthi had not devoted weeks of her time to helping the students write and prepare. They all recognized this and at our farewell dinner, joined in a raucous and sustained round of applause for their two magnificent Cokers.

Everything I have seen of Sruthi—and I have seen a great deal—leads me to believe, with utter confidence, that she will be a splendid law clerk. Sruthi is brilliant; hardworking; punctual; warm-hearted and generous of spirit. What else could a judge want? What else could anyone want? If Sruthi joins you in your chambers, you will be as pleased with your decision as I have been with mine to ask her to be my Coker Fellow last fall.

Sincerely,

Anthony Kronman

Anthony Kronman - anthony.kronman@yale.edu - 203-432-4934

May 17, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Sruthi Venkatachalam who is applying for a clerkship in your chambers.

Sruthi took an introductory constitutional law course with me and then served has served as my research assistant over the last year and was totally devoted in the role. She worked on several projects. Most were historical in focus. One project examined how Burger Court decisions on wealth inequality evolved in the 1970s for which Sruthi did archival work. Another project involved research into the social movement roots of “reasons bans” on abortion (prohibiting abortion on the basis of race or sex or disability). She has also researched the Meese Justice Department’s early involvement in originalism in the 1980s. Sruthi helped proofed the manuscript of my recent article The Politics of Memory. Sruthi did meticulous work on each of these projects. None has involved writing a memo on a question of law, however.

It has been a great pleasure to with Sruthi. She is responsible and precise in handling research assignments and is full of enthusiasm and curiosity of a kind that I think would make her an valuable assistant in chambers, whether working independently or in teams.

Please call me at 203-661-6181 if I can be of further assistance in your decision.

Sincerely,

Reva Siegel

Reva Siegel - reva.siegel@yale.edu - 203-432-6791

Sruthi Venkatachalam
Writing Sample
Advanced Written Advocacy Assignment Four

This brief was written for the final assignment in Advanced Written Advocacy.

The basic factual premise is as follows:
F.M., a minor who attends Boston Collaborative High School (BCHS), posted a short video on TikTok. In the video, she says "I wish we were still on summer break. If just one of you would call the school and threaten to shoot a few teachers the next day, we'd get the day off. And if someone would make that threat every night, we'd never need to go to school." She then laughed and did a TikTok dance-move. F.M. did not identify which school she attended in the video. She did not specify where she lived, but her username, "BostonFaith," indicated her location. Many of her followers were also BCHS students who recognized her as their classmate. Another student at the school, whose mom was a math teacher at BCHS, saw the video and shared it with his mom. She then forwarded a copy of the video to the school's principal, Ruth Tran.
The following day, Principal Tran called F.M.'s mother to state that F.M. had made threatening remarks and would be suspended for two weeks, effective immediately. F.M. filed a motion for a TRO to block the suspension.

This assignment is an appellate argument briefing the issue of whether a TRO should be granted. We were told only to address the substantive issue of whether the plaintiff would succeed on the merits of securing a TRO. The assignment assumes that another attorney would brief whether a TRO could be appealed on interlocutory appeal. This sample covers one factor of the TRO analysis, the likelihood of success on the merits.

This brief supports the position of BCHS and the City of Boston. It follows a lower court decision where the BCHS succeeded on the merits and F.M. appealed the ruling.

INTRODUCTION

This case concerns Boston Collaborative High School's ("BCHS") obligation to create a secure environment for its students and staff. Such a responsibility requires BCHS to impose sensible and proportionate punishments on those who threaten that environment. F.M., a BCHS student, created a video on the popular social media site TikTok in which she suggested students should make threats against teachers to force school cancellations. J.A. 35. Upon being made aware of the TikTok, BCHS' principal Ruth Tran ("Tran") suspended F.M. for two weeks for her "threatening remarks." J.A. 36.

F.M. filed a motion for a temporary restraining order ("TRO") to halt the suspension. J.A. 23-33. In her motion, the Plaintiff argued the school's actions infringed upon her First Amendment rights. J.A. 27-33. The district court rejected this argument. It noted that speech like F.M.'s video is "plainly within the realm of speech schools *can* and *should* act upon" while the failure to do so may be "grossly irresponsible." J.A. 45 (emphasis added). The plaintiff filed a timely interlocutory appeal seeking to reverse the lower court opinion. J.A. 52-70.

The motion should not be granted since the Plaintiff has failed to prove a likelihood of success on the merits. The Plaintiff's arguments are wrong as a matter of law. Schools have the authority to regulate speech, like F.M.'s TikTok, that would "materially and substantially interfere" with school activities. *See Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 514 (1969). The fact this speech occurred off-campus in no way alters the conclusion. The Supreme Court, too, has emphasized that in matters of school discipline, judges must give deference to school administrators. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Col. Of Law v. Martinez*, 561 U.S. 661, 686 (2010). For these reasons, the Defendants respectfully request that this Court affirm the district court's judgement and uphold F.M.'s suspension.

STATEMENT OF FACTS

School gun violence occurs with unfortunate frequency and is one of the most serious threats school administrators face. On January 7, 2023, a six-year old boy shot a teacher in his elementary school. Livia Albeck-Ripka & Eduardo Medina, *6-Year-Old Shoots Teacher at Virginia Elementary School*, N.Y. Times, Jan. 11, 2023. On May 24, 2022, a former student of Robb Elementary School in Uvalde, Texas murdered nineteen students and two teachers. Rick Rojas & Edgar Sandoval, *The Excruciating Echo of Grief in Uvalde*, N.Y. Times, Aug. 8. 2022. Since 1999, over 331,000 children from 354 schools have been directly impacted by school shootings. John Woodrow Cox et.al, *School Shooting Database*, Wash. Post, Jan. 9. 2023. Administrators must be vigilant to ensure their school is not the scene of the next tragedy. It is with this knowledge that Tran acted.

F.M. is a 17-year-old student at BCHS. She maintains a public TikTok profile, BostonFaith, where she posts short videos. J.A. 1. She has more than 500 followers, including all twenty-three of her classmates and dozens of other BCHS students. J.A. 2-3. On November 1, 2022, F.M. posted a video on her TikTok where she said, "I wish we were still on summer break. If just one of you would call the school and *threaten to shoot a few teachers* the next day, we'd get the day off. And if someone would make that threat every night, we'd never need to go to school." J.A. 34-35 (emphasis added). She then laughed and did a TikTok dance move. J.A. 34-35.

Another student at BCHS, whose mom is a math teacher at the school, was alarmed by the video. In a declaration he submitted, he stated:

> I didn't think that F.M. was seriously going to threaten the school, but she sent it out to everyone. I can't say the same for every other kid at this school who saw the video. It wouldn't be a huge deal except F.M. did essentially talk about people threatening a school shooting. I felt like I had to warn my mom because I'd rather be safe than sorry. I didn't want to feel like I could have done something if the worst happened, and someone took it too far.

J.A. 5. Based on these concerns, he passed the video along to his mom, who reported the video to Tran. J.A. 5.

Principal Tran watched the Tiktok and was alarmed. It had been viewed over 200 times, with several users commenting on the content. J.A. 13-14. One TikTok user, commented "TOTALLY! Gonna [sic] do Burcham[1] first, maybe our test will get cancelled or we'll get a sub or something." J.A. 14. Another user, commented "PLEASE. I'll call today, whos [sic] doing tomorrow? Tran is going to FREAK." J.A. 14. Later investigations revealed that these comments were posted by two BCHS students.

Tran responded to the TikTok with standard procedures. Under §5.2 of the Student Handbook, BCHS holds a strict "zero tolerance policy" towards "any act, threat, or suggestion of violence against BCHS, teachers, students, or any member of the BCHS community." J.A. 4. Tran correctly determined that F.M.'s video constituted a threat of violence to the school's teachers and that F.M. had violated §5.2 of the Student Handbook. On November 2, 2022, Tran called F.M.'s mother to inform her that F.M. had made "threatening remarks against the school community" and that, as a result, F.M. was suspended for two weeks, effective immediately. J.A. 36.

LEGAL STANDARD

Courts must weigh four factors when considering whether to grant a TRO: the likelihood of success on the merits, whether the plaintiff will suffer irreparable harm if relief is denied, a comparison between harm to the plaintiff if preliminary relief is not granted and harm to the defendant if the relief is granted, and the effect of the preliminary relief on the public interest. *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020).

[1] Joanna Burcham is a math teacher at BCHS high school.